ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 150.

JOHN F. WOLLENSAK, APPELLANT,

vs.

SARGENT & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED OCTOBER 24, 1893.

(14,103.)

(14,103.)

SUPREME COURT OF THE UNITED STATES.

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JOHN F. WOLLENSAK, APPELLANT,

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

INDEX.

	Original.	Print.
Stipulation for addition to record	1	1
Letters patent No. 81703, granted Stickney & McGee September 1, 1868	2	2
Letters patent No. 85143, granted Stickney & McGee December 22, 1868	4	4
Letters patent No. 79541, granted Bayley & McClusky July 7, 1868	6	6
Letters patent No. 93408, granted F. E. Brown August 10, 1869	8	8
Letters patent No. 126,327, granted G. W. Perry April 30, 1872	10	10
Letters patent No. 7998, granted N. W. Speers March 25, 1851	12	12
Stipulation for addition to record	19	15
Letters patent No. 317,036, granted Chas. E. Steller May 5, 1885	20	16
Letters patent No. 331,289, granted Arthur English December 1, 1885	23	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1893.

1 Supreme Court of the United States, October Term, 1893.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY. } Term Number, 150.

Stipulation de Record.

It is stipulated between counsel for the respective parties that the record in this cause be supplemented by the addition of Patent Office copies of the following letters patent of the United States, the same having been introduced in evidence in the court below by the defendants and having been used on the trial and being material to the determination of the issues on appeal, to wit:

No. 81703, September 1, 1868, to Stickney & McGee.
No. 85143, December 22, 1868, " " " "
No. 79541, July 7, 1868, " Bayley & McClusky.
No. 93408, August 10, 1869, " F. E. Brown.
No. 126,327, April 30, 1872, " G. W. Perry.
No. 7998, March 25, 1851, " N. W. Speers.

And it is further stipulated that the clerk of the court be authorized and requested to incorporate, in such manner as he may deem convenient, copies of the said letters patent into the printed volumes of the record.

EPHRAIM BANNING,
Counsel for Appellant.
JOHN K. BEACH,
(*Counsel for Appellees*).

2 UNITED STATES PATENT OFFICE.

W. C. STICKNEY and JAMES MCGEE, of Steubenville, Ohio.

Letters Patent No. 81703, dated September 1, 1868.

Improvement in Ventilating-sash Adjuster.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that we, W. C. Stickney and James McGee, of Steubenville, in the county of Jefferson, and State of Ohio, have invented a new and improved ventilating-sash opener; and we do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings, forming part of this specification.

(Here follows diagram marked p. 3.)

Figures 1, 2, and 3 are detail views, illustrating different forms of our improved device.

Similar letters of reference indicate corresponding parts.

Our invention has for its especial object to furnish an improved device for opening and closing ventilating-sash doors or transoms of railroad cars, which shall be simple in construction, easily operated, and which will hold the sash securely in any position to which it may be adjusted.

And it consists in the construction and combination of the various parts, as hereinafter more fully described.

A is the casing of the window, and B is the sash, door, or transom which is required to be opened to ventilate the car or room.

The sash B may be pivoted or hinged to the casing, as may be desired.

C is a three-armed plate, which, in the case of pivoted sash, is securely and rigidly secured to said sash, with one arm projecting inward, as shown in Fig. 2.

In the case of hinged sash, the three-armed plate C is pivoted by one arm to a support attached to the casing A, and a second arm is connected to the sash to be moved by a short connecting-rod, D, as shown in Figs. 1 and 3.

E is a rod, moving vertically through a thimble, F, attached to the casing A.

Upon the lower end of the rod E is formed a knob or handle, *e*, for convenience in operating it.

The upper end of the rod E is pivoted to the inwardly-projecting arm of the three-armed plate C by a pivoting-pin and slot, said slot being formed either in the said inwardly-projecting arm of the

Stickney & Mc Gee,

Car Ventilator,

No. 81,703. Patented Sep. 1, 1868.

No. 150
Hollinshead
v.
Sargent & Co. } p. 3.

Fig. 1.

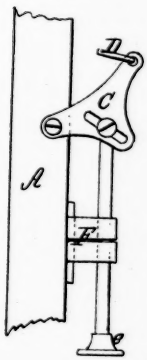


Fig. 2.

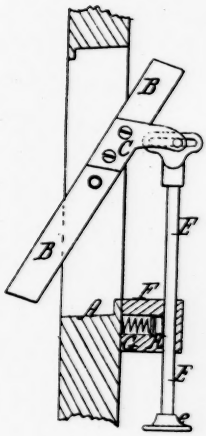
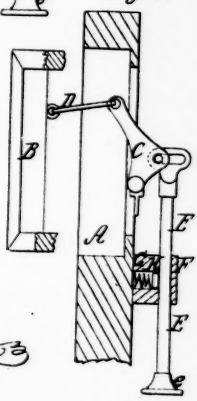


Fig. 3.



Witnesses;
W. C. Ashkettle 3d
Wm. A. Morgan

Inventors;
W. C. Stickney
J. Mc Gee
per Munn & Co
attorneys

plate C, or in the upper end of the rod E, or in a cross-head formed upon or attached to the said upper end of the said rod E.

In practice, it will generally be found advisable to slot or groove the end of either the inwardly-projecting arm of the plate C or the upper end of the rod E, to receive the other of said parts, so that the line of draught upon the pivoting-pin, by which said parts are connected to each other, may be in the same plane with the said three-armed plate C and rod E.

The rod E is held in any position to which it may be moved, by a small coiled spring G, having a friction-block or plug, H, attached to its outer end, which said spring and block are placed in a cavity in the standard of the thimble F, so that the said block H may be forced by the action of the said spring G against the side of the rod E, holding it securely in any position to which it may be raised.

We claim as new, and desire to secure by letters patent—

The combination of the three-armed plate C and sliding rod E with the coiled spring G, friction-block H, and thimble F, substantially as herein shown and described.

W. C. STICKNEY.
JAMES McGEE.

Witnesses:
J. J. LAWLER.
S. H. McBETH.

4 UNITED STATES PATENT OFFICE.

W. C. STICKNEY and J. MCGEE, of Steubenville, Ohio.

Letters Patent No. 85143, dated December 22, 1868.

Device to Open Railway-car Ventilators.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that we, W. C. Stickney and J. McGee, of Steubenville, in the county of Jefferson, and State of Ohio, have invented a new and improved ventilator-opener for cars, &c.; and we do hereby declare that the following is a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawings, forming part of this specification, in which—

(Here follows diagram marked p. 5.)

Figures 1 and 2 are vertical sections of a car-ventilator, to which our improved opener has been attached.

Similar letters of reference indicate corresponding parts.

Our invention has for its object to furnish an improved device, by means of which the pivoted sash, shutter, or valve of the ventilator may be opened, closed, or secured at any desired angle, conveniently and securely; and

It consists in the construction and combination of the various parts of the opener, as hereinafter more fully described.

A represents the body of the car.

B represents the sash, shutter, or valve of the ventilator, which is pivoted to the frame or body A, in the ordinary manner.

C is an arm or standard, which is securely attached to the sash B, upon or near the line of its pivots.

The T, or cross-head d^1, of the sliding rod D, is slotted, and is securely attached to the end of the rod D and upon the other end of said rod is formed, or to it is attached a knob or handle, d^2, for convenience in opening our device.

The upper end of the rod D is pivoted to the outer or free end of the arm or standard C, by a pivoting-pin and slot, said slot being formed either in the said outer or free end of the arm or standard C, or in the upper end of the rod D, or in the T, or cross-head d^1, of the sliding rod D, as shown in Figs. 1 and 2.

The rod D passes through and slides longitudinally in the thimble E, the standards or shank e^1 of which is secured to the frame A.

By this construction, the sash B may be opened or closed fully, or to any desired angle, by simply operating the sliding rod D.

In the case of cars, or where the device is subject to constant

Stickney & Mc Gee,

Car Ventilator,

No. 85,143. Patented Dec. 22, 1868.

Fig. 1.

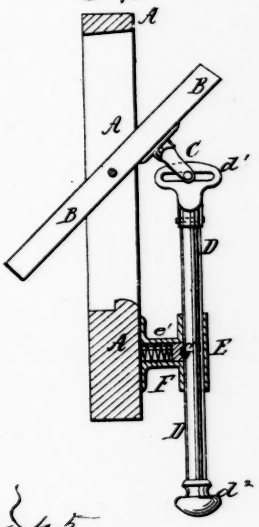
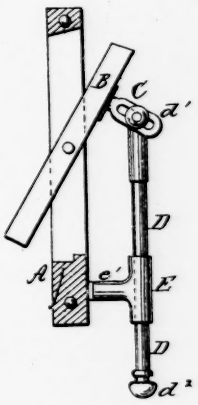


Fig. 2.



No. 150.
Wollensak } p. 5
v.
Sargent & Co.

Witnesses,
A. W. Almquist
Upm'd Morgan

Inventors;
W. C. Stickney
J. McGee
per Munn & Co
Attorneys

wear, it is necessary that the rod D should be secured, so that it may not work or slip downward, and thus close the ventilator.

To prevent this, the standard or shank e^1, of the thimble E, is made hollow, and in the recess thus formed is placed a coiled-wire spring, F, and a friction-block, G, or their equivalent, which said block G is forced against the rod D by the elasticity of the spring F, so as to hold the said rod securely in any position in which it may be placed.

Having thus described our invention,

We claim as new, and desire to secure by letters patent—

The thimble E, hollow shank e^1, spring F, and friction-block G, and the vertically-sliding rod D, having the slotted T-head d^1, in combination with the pivoted sash B, and frame A, arranged and operating as described for the purpose specified.

W. C. STICKNEY.
J. McGEE.

Witnesses:
J. J. LAWLER.
S. H. McBETH.

6 UNITED STATES PATENT OFFICE.

G. W. R. BAYLEY and JOHN MCCLUSKEY, of Algiers, Louisiana.

Letters Patent No. 79541, dated July 7, 1868.

Improvement in Railroad-car Ventilators.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that we, G. W. R. Bayley and John McCluskey, of Algiers, Orleans parish, and State of Louisiana, have invented a new and useful improvement in the "hanging of ventilating-windows of railroad-cars, steamboats, &c.;" and we do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings, forming part of this specification.

The present invention relates to an arrangement of mechanism for the more convenient opening or adjusting, at any desired angle, or closing by one motion, of all the raised-roof windows of railroad-cars, steamboats, &c.

In the accompanying plate of drawings, our improvement embraced by the present invention is illustrated—

(Here follows diagram marked p. 7.)

Figure 1 being an elevation of a portion of a series of the upright-roof windows to a railroad-car, &c., and

Figure 2 a transverse horizontal section, taken in the plane of the line *x x*, Fig. 1.

A, in the drawings, represents a portion of the upright framework to a railroad car, steamboat, &c., in openings B of which the upright-roof windows C are hinged, being swung open to ventilate the interior of the cars.

In the drawings, these windows C are four in number, and are shown as arranged to open outwards, the two at one end to open in one and the same direction, and the two at the other end both in the opposite direction.

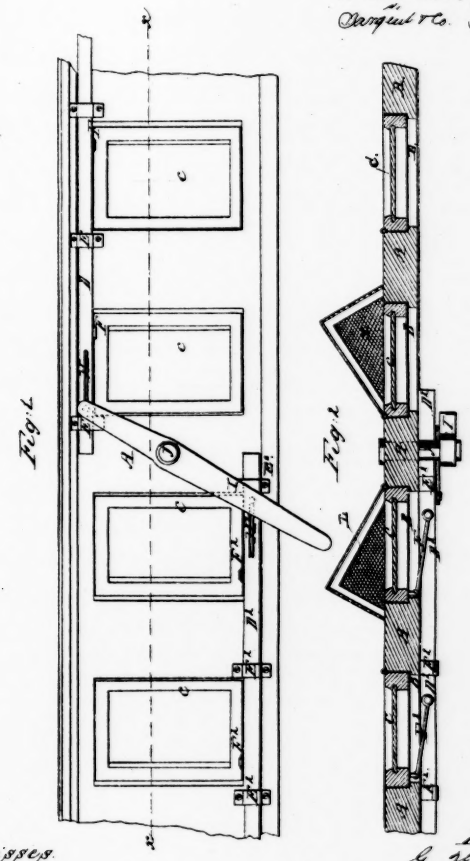
D D^2, two rods, the one arranged to move in guides E, along and above two of the windows, with which they are connected through the link or connecting-rods F, suitably hung therefrom and the other rod, D^2, similarly arranged to move in guides E^2, below the other two windows, to which, by connecting-rods F^2, as explained for the rods F, they are connected, and then the two rods, D D^2, by and through connecting-pieces H H^2, respectively, to a common operating-lever, I, at equal distances from its centre or fulcrum-pin J, which lever I is arranged in a vertical position, and projects below

Bayley & Mc Cluskey,

Car Ventilator.

No. 79,541. Patented July 7, 1868.

No. 150. Washington D.C. } Jr. 7.



Witnesses.
Theo. Tuschi
Wm. Dean Overell

Inventor
G. W. R. Bayley
J. Mc Cluskey
Per Munn & Co
Attorneys

the roof-windows inside of the cars a sufficient distance for being operated with the hands.

By moving the lever I, the windows will be either more or less opened or closed, as the case may be, two in one direction and the other two in the opposite direction, as is obvious without any further explanation.

The sliding bar or bars can be secured to the sides of the raised roof, either above or below the windows, or both above and below them, in suitable caps or guides, which will allow the bar or bars to be moved forward and back in the direction of their length.

These bars are to extend past all the windows on one side, or from the centre to the ends, both ways, or in case of the raised roof of steamboats, in sections of any desired length. And each window is to be connected with the proper sliding rod by means of connecting-rods, such as described; the length of the connecting-rod being such as to open the window to the extent desired.

As will be seen by the drawings, the arrangement is for opening the windows each way from the centre, in order to admit fresh air from or through the windows in the front half of the raised roof, and to allow for the escape outwards of the foul or heated air through the windows of the rear half of the raised roof.

By this arrangement the windows may be opened alternately forwards and backwards, first one forwards, the next backwards, and so on; or they may be pivoted at the middle, either vertically or horizontally, and all be opened at will either way, alternately, or, by means of a shaft extending from one side to the other of the raised roof, one lever can be made to operate the sliding bars and windows on both sides of the car or boat, &c., at once.

In the drawings, a wire-netting screen, L, is shown as applied to the windows, to prevent sparks, cinders, dust, &c., from entering the car or boat through the windows when open.

We are aware of the patent granted to M. C. Andrews, the application for which was filed August 12, 1867, but as this forms no part of our invention, we do not, therefore, claim it.

What we claim as new, and desire to secure by letters patent, is—

The arrangement of the connecting-rods D and D^2 with the connecting-rods F F^2, forming a series of operating-mechanism for opening and closing the windows, in the manner and for the purposes described.

G. W. R. BAYLEY.
JOHN McCLUSKEY.

Witnesses:
ISAAC SAMUELS.
P. J. HUDER.

8 UNITED STATES PATENT OFFICE.

F. E. BROWN, of Springville, Iowa.

Letters Patent No. 93408, dated August 10, 1869.

Improved Shutter-worker.

The schedule referred to in these letters patent and making part of the same.

To whom it may concern:

Be it known that I, F. E. Brown, of Springville, in the county of Linn, and State of Iowa, have invented a new and useful improvement in apparatus for operating and fastening window-blinds; and I do declare that the following is a true and accurate description thereof, reference being had to the accompanying drawings, and to the letters of reference marked thereon, and being a part of this specification.

The nature of this invention relates to an apparatus so constructed, that by its use outside window-blinds may be opened and closed, and secured in any desired position by the operator within the house, and without the necessity of raising or opening the window.

The invention consists in a suitable hinge, operated from the interior of the building by means of a rod extending through the window-casing, and connecting with said hinge by a proper arm, the whole so arranged as to operate as herein described.

In order to enable those skilled in the matter to manufacture and operate this device, I will now proceed to name and describe its various parts, their relation to each other, and their operation.

In the drawings, which are a plan view—

(Here follows diagram marked p. 9.)

A represents a cross-section of a window-frame, through which passes the rod B, provided at its inner end with any plain or ornamented style of handle, *a*, which may be desired.

C is a hinge, which may be of the ordinary construction of window-blind hinges, and is provided with an arm, *b*, to the outer end of which is pivoted the outer end of the curved lever or connecting-rod *c*, while the inner end of said rod is in turn pivoted to the rod B, which is slightly curved for the purpose, as at *d*.

A metallic socket, E, is secured to the inner face of the window-frame, and through this socket the rod B also passes.

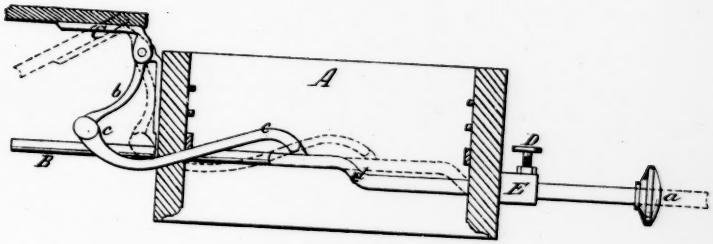
This socket is provided with a set-screw, D, by means of which the rod B may be secured in any desired position.

These hinges and their attachments should be made in pairs, one of each pair being for the right and the other for the left hand blind.

F. E. Brown.

Shutter Worker.

No. 93,408. Patented Aug. 10, 1869.



No 150.
Wallensak } p. 9
v.
Sargent & Co

Witnesses.

H. F. Eberts
John Slater

Inventor.

F. E. Brown,
per Attorney
Thos. H. Sprague

The drawing represents the apparatus with the blind closed.

By pulling in the rod B, the blind may be opened to any desired position, and secured by means of the set-screw D.

The operation of this device is so simple that a further description thereof is deemed unnecessary.

What I claim as my invention, and desire to secure by letters patent, is—

The combination and arrangement of the guide-rod B, provided at one end with a handle, *a*, and set-screw D, for securing it in any position, and the pivoted arm *c*, jointed as described, and hinged to the blind, as and for the purposes above set forth.

F. E. BROWN.

Witnesses:

J. S. LOVE.

E. W. HARTMAN.

10

126,327.

UNITED STATES PATENT OFFICE.

GEORGE W. PERRY, of Wilmington, Delaware.

Improvement in Devices for Operating Car-ventilators.

Specification forming part of Letters Patent No. 126,327, dated April 30, 1872.

Specification describing a certain improvement in devices for operating car-ventilators, invented by George W. Perry, of Wilmington, in the county of New Castle and State of Delaware.

Passenger-cars for railroads, as at present constructed, are provided with what is technically termed "Monitor" decks—that is, with a portion of the roof of the car rising above the other portions thereof—the vertical sides of the highest portion being provided with frames having glass set in them, the frames being pivoted at their centers so as to be capable of being turned in such a manner as to provide for the ingress of fresh air to the car, and also for the egress of foul or heated air from the car to the atmosphere. In all cases where such devices are used some device for holding the frame or ventilating-window in its open or partially open position is absolutely necessary; and the object of this invention is to furnish a convenient and reliable means of accomplishing this result; and to this end it consists in a notched rod for holding the window or ventilating-valve in any fixed position, when said rod is used in combination with other devices, as will be more fully explained hereinafter.

(Here follows diagram marked p. 11.)

Figure 1 is a side elevation of a portion of a railroad car, showing one of the ventilating-windows with my improvement attached thereto. Fig. 2 is a side view, showing the window in its open position, with the parts of the operating device in the proper position for holding the window open.

Corresponding letters refer to corresponding parts in both figures.

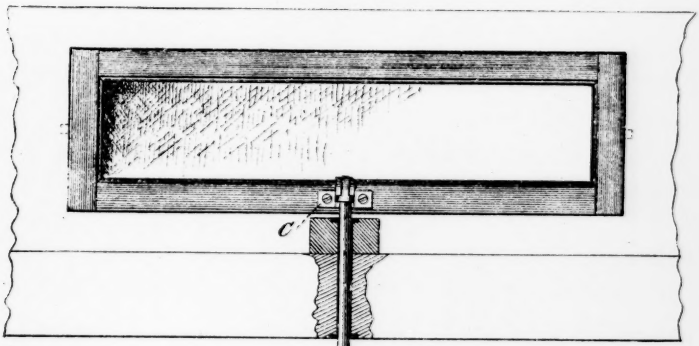
In constructing devices of this character I use a rod, A, of metal, the lower end of which, for convenience in operating it, should be provided with a knob, as shown, its length being sufficient to permit it to pass through one of the carlines in the roof or through some other suitable support, and extend upward far enough to receive the rod which is attached to the frame. Upon one portion of this rod there is formed a series of depressions, as shown in Fig. 2, while its upper end is flattened or otherwise adapted to enter the end of rod B, soon to be described. Upon the upper or lower surface of the carline, through which the rod A passes, there

GEORGE W. PERRY.

Device for Operating Car-Ventilators.

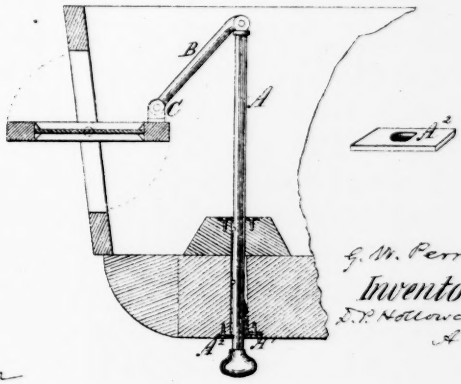
No. 126,327. Patented April 30, 1872.

Fig 1.



No. 150.
Wollensak
v.
Sargent & Co.
p. 11

Fig 2.



Witnesses.
A. Ruppert.
C. F. Clausen

G. W. Perry
Inventor.
D. P. Holloway & Co
Attys

is screwed or otherwise secured a plate of metal, the aperture in the center of which is of the form shown in the detached view, A^2, in order that, when one of the depressions in the rod A comes opposite to it, the spring A^1, which, as shown in Fig. 2, is arranged upon the side of the rod which is opposite to such depression, shall force the rod over, so that the shoulder upon the upper side of the depression shall rest upon the plate, and thus hold the rod in any desired position until it becomes desirable to change it, when, by pressing it toward the spring, the shoulder will be carried away from contact with the plate, and the rod elevated or depressed according as it is necessary to open or close the window. To the upper end of the rod A there is hinged a rod, B, its upper end being curved, as shown, while its opposite end is hinged to a bracket, C, which is secured to the frame of the window.

When the parts have been connected as described, and it is desirable to have the ventilating-window open to its full extent, the parts are placed in the position shown in Fig. 2; and when it is desirable to have it closed, the parts are shifted to the position shown in Fig. 1; but it may be held in any intermediate position by bringing any of the intermediate depressions opposite the plate A^2, when the spring will act to force the rod over, as above described.

I have described this device as applicable to car-ventilators only; but it will be found to be equally applicable to steamboats, sailing vessels, and all other places where graduated ventilators are required.

I am aware that ventilating-windows have heretofore been opened and closed by means of a rod sliding vertically through a socket in which there is placed a spring, but in all such cases the rods have had a smooth surface, and consequently differ essentially from mine so far as holding the ventilator in any fixed position is concerned.

What I claim as my invention, and desire to secure by letters patent, is—

The combination, with the ventilating window or valve, of the connecting-rod B, notched slide-rod A, perforated plate A^2, and spring A^1, arranged relatively, substantially as and for the purpose set forth.

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

G. W. PERRY.

Witnesses:
THOS. M. CULBERT.
SAM'L CULBERT.

12 Tracing, $1.00. Cert. copy, 1.85 ac.

(2-175.)

DEPARTMENT OF THE INTERIOR.

[Vignette.]

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This to is certify that the annexed is a true copy from the records of this office of the specification and drawing in the matter of the letters patent granted N. W. Speers March 25, 1851, number 7998, for improvement in apparatus for moving and securing shutters, etc.

In testimony whereof I, John S. Seymour, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 8th day of November, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

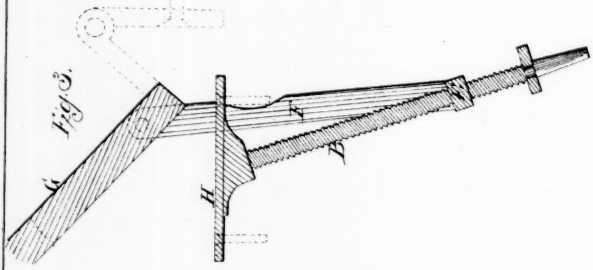
Seal Patent Office, United States of America.

JOHN S. SEYMOUR,
Commissioner.

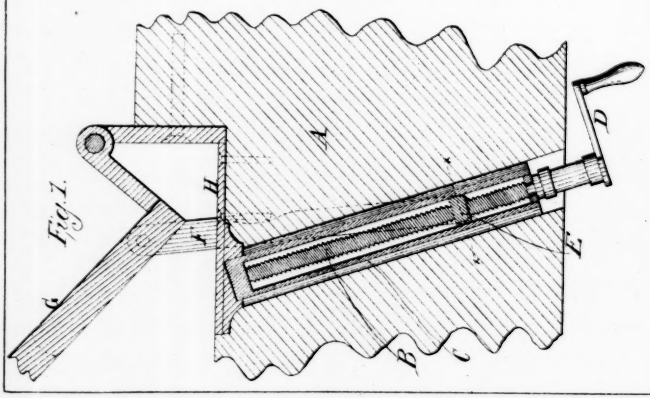
N. W. Speers'

Mode of Opening, Closing & Fastening Window Shutters.

No. 7,998. Patented Mar. 25, 1851.



No. 150
Wallcourt
to
Sargent & Co. } p. 17



13 N. W. SPEERS.

Apparatus for Moving and Securing Shutters, etc.

Specification forming part of Letters Patent No. 7998, dated Mar. 25, 1851.

To all whom it may concern:

Be it known that I, N. W. Speers, of Cincinnati, in the county of Hamilton and State of Ohio, have invented a new and useful apparatus for opening and closing window-shutters from the inside of the house to which they are attached, and fastening them at any desired point in their semi-circuit without raising the sash, which is described as follows, reference being had to the annexed drawings of the same, making part of this specification:

(Here follows diagram marked p. 17.)

Figure 1 is a top or bird's-eye view of the apparatus applied to a window, the sill and shutter of the window being represented in horizontal section.

Figure 2 is a section of the same at the line *x x* of figure 1.

Figure 3 is a top view of the apparatus applied to a window-shutter hinged or hung in the ordinary mode.

Similar letters refer to like parts.

The nature of my improved apparatus consists in opening and closing the shutters by means of screws embedded in the lower part of the frame of the window, operating, when turned by a key on the inside, upon nuts connected to the lower portion of the window-shutters by arms in such a manner as to enable them to be moved with great ease and held firmly at any desired point in their
14 semi-circuit, and secured when closed against all danger of being opened from the outside.

To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and mode of application.

A is the lower portion of the frame of the window.

B is a horizontal metallic screw-shaft inserted in an opening formed by an angle diagonally through the frame and turning in suitable metallic boxes at its ends secured in the window frame. These boxes may be either connected to the extremities of a cylindrical or rectangular metallic casing, C, having a movable top and enclosing the screw-shaft B, and fastened at its outer end to the window frame as represented in figure 1, or the casing may be dispensed with and the boxes may be fastened to the frame in any convenient manner (as represented in figure 3). The screw-shaft B is made square at its inner end to receive a socket crank or key D, by which it is turned.

E is a metallic nut surrounding the screw-shaft, which passes through the same, connected by a pin at its lower part to a

horizontal bar or arm, F, extending through a space in the window frame to the outside of the same and attached at its outer end by a pin to a metallic plate or arm, G, secured by screws to the lower edge of the shutter and extending at right angles from one wing of the lower hinge of the shutter, which is in this case (when the hinge and apparatus are cast together to be applied to a new shutter, as represented in figure 1) secured at the extreme lower end of the shutter, the other wing of the hinge being cast with or otherwise attached to the plate H, to which the casing is connected, which secures it firmly to the window frame.

In case it is desired to apply this principle of apparatus to a shutter hung on the ordinary hinges, it is formed after the manner of the section marked figure 3 in the annexed drawings, the plates or arms G H being cast distinct from the wings of the hinge.

In applying the apparatus to a window, it is only necessary to mark on the lower portion of the frame the distance from the axis on which the shutter moves to the point on the outer face of the frame where the line of the screw-shaft is to intersect and ascertain on the inner surface of the frame where the line is to intersect there, and after arriving at these points to bore an auger hole through the frame suitable to receive the screw-shaft and its attachments, said hole being afterwards covered on the inside by a brass, silver, or other plate, perforated to allow the entrance of the key D, and on the outside by the plate.

The crank or key for turning the screw-shaft may be made as represented or of any ornamental form desired.

When it is desired to either open or close the shutter the crank or key D is either turned to the left or right, as the case may be, causing the metallic nut E to be moved out or in, forcing or drawing the shutter with it in its movements with a speed and power commensurate with the angle of the threads of the screw with the line of the shaft on which they are formed.

After the shutter is once moved to the position desired, either entirely open or closed or at any intermediate point, it will be held there firmly by the bar or plate F attached to the nut E, through whose agency it was moved, the binding of the nut on the screw-shaft B preventing it from moving either way without the screw-shaft being turned.

What I claim as my invention and desire to secure by letters patent is the manner of opening and closing window-shutters from the inside and securing them firmly at any point in their semi-circuit by means of the horizontal screw-shaft B inserted in an opening in the lower portion of the window-frame, metallic nut E surrounding the same, and the bar or plate F attached to the shutter, substantially as described.

N. W. SPEERS.

A. I. PATTERSON,
JASHER PEUZELL,
Witnesses.

J. F. F.
M. A. O.

[Endorsed:] 22253. D., '93.

18 [Endorsed:] Case No. 14103. Supreme Court U. S., October term, 1893. Term No., 150. John F. Wollensak, app't, *vs.* Sargent & Company. Stipulation to amend record. Filed Oct. 24, 1893.

19 Supreme Court of the United States, October Term, A. D. 1893.

JOHN F. WOLLENSAK *vs.* SARGENT & COMPANY. } No. 150. Appeal from U. S. Circuit Court, District of Connecticut.

The transcript of the record in this cause being defective by reason of the omission of the Charles Steller patent of May 5, 1885, No. 317,036, and the Arthur English patent of December 1, 1885, No. 331,289—

We hereby stipulate and agree that the transcript may be corrected by the insertion of ordinary office copies of said patents, and that the clerk may have such copies properly printed and inserted therein.

EPHRAIM BANNING,
Counsel for Appellant.
JOHN K. BEACH,
Counsel for Appellee.

20 UNITED STATES PATENT OFFICE.

CHARLES E. STELLER, of Milwaukee, Wisconsin.

Transom-lifter.

Specification forming part of Letters Patent No. 317,036, dated May 5, 1885; application filed January 21, 1885. (No model.)

To all whom it may concern:

Be it known that I, Charles E. Steller, a citizen of the United States, residing at Milwaukee, in the county of Milwaukee and State of Wisconson, have invented certain new and useful improvements in transom-lifts; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters or figures of reference marked thereon, which form a part of this specification.

My invention relates to improvements in transom lifts and locks, and pertains to the construction of the lifting-bar, the devices for locking it at its several places of adjustment, and to the construction of the supporting-guideways by which the lifting-bar is attached to the side of the doorway.

My invention is further explained by reference to the accompanying drawings.

(Here follows diagram marked p. 22.)

Figure 1 represents a perspective view of my device attached to the transom and doorway. Fig. 2 is a perspective view of my invention removed from the door and transom. Fig 3 is a perspective view of one of the retaining-keepers by which the lifting-rod is held in place. Fig. 4 represents a front view of the retaining-keepers and the screw for locking the lifting-rod at the desired places of adjustment. Fig. 5 is a side view, part in section, of the lifting-rod and device for locking it.

Like parts are represented by the same reference-letters throughout the several views.

A is the transom, which is attached at the upper edge to the doorway.

B is the transom-arm. The arm B is made of a single piece of flat metal which is set into and secured by screws to the end of the transom.

C is the lifting-bar, which is also formed of a single piece of flat metal which is arranged edgewise to the door-frame and transom, so that the strain of lifting the transom is brought to bear against the edge of the bar, whereby it is obvious that the bar so formed and so arranged is capable of supporting a much heavier weight in proportion to its heft than the ordinary round rods heretofore used. The

(No Model.)

C. E. STELLER.

TRANSOM LIFTER.

No. 317,036. Patented May 5, 1885.

Fig. 1

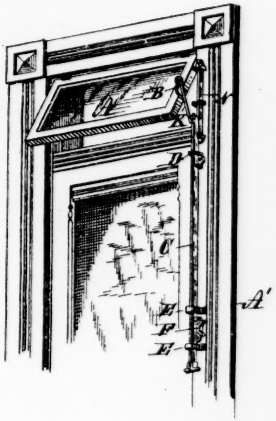


Fig. 2

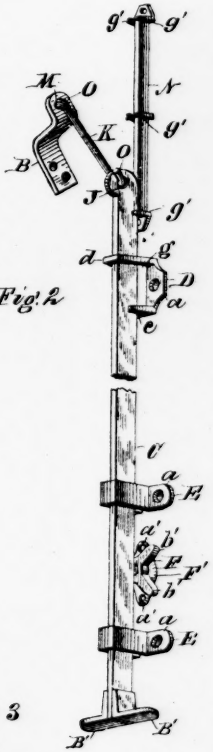


Fig. 4

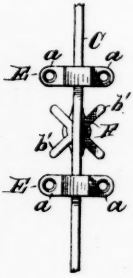


Fig. 5

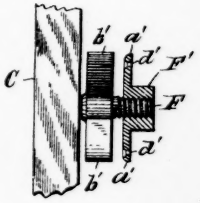


Fig. 3

No 150
Wallensak
&
Angell & Co.

Witnesses
G. M. Griffey
Matthew J. Kohimer.

Charles E. Steller
Inventor
By Emrie & Brandon
Attorneys

lifting-bar C is retained edgewise in the required position by the keepers D and E. The keeper D is provided with vertically-arranged fastening-plates *a*, horizontal rod-bearing *b*, retaining-lugs *c c*, and bracket *d*, having open way *g* for the reception and passage of the lifting-bar. The opening *g*, formed in the bracket *d*, is made for convenience in molding, and also to permit the upper joint of the lifting-bar to be passed through it preparatory to being attached to the door-frame. It is obvious that by the peculiar construction of the keepers they are adapted to perform the threefold purpose of supporting, guiding, and retaining the lifting-bar, and they are also by such form adapted to be readily formed by casting without additional labor. The lower keepers, E E, are formed to closely fit the lifting-bar, so as to properly guide the same, and being open at their base they permit the lifting-bar C to be readily inserted. The lifting bar C is locked at any desired point of adjustment by the set-screw F, which is located midway between the lower keepers, E E, and is interposed between the lifting-bar C and the door-frame A'. The thread of the screw F operates in a nut or socket, F', which is inserted in the front surface of the door-frame, and is provided with a fastening-plate, *a'*, through which small screws are inserted into the door-frame at *d' d'*, to prevent said nut from turning with the adjusting-screw. The adjusting-screw F is provided with radial arms *b'* by which it is turned when fastening or releasing the lifting-bar. The screw F serves as a supporting-bearing to the lifting-rod, and prevents it from coming in contact with the door-frame. When the set-screw is turned outward it bears against the inner edge of the lifting-bar, whereby the outer edge of the lifting-bar is pressed against the inner surface of the keepers. The distance between the keepers E E is such as to permit of easy access to the adjusting-screw. By an inverse movement of the adjusting-screw the lifting-bar C is released.

In transom-lifts as heretofore constructed the lifting-bar has been locked by contact of the point of the screw with the convex surface of the lifting-rod.

By my improvement it is obvious that I have so increased
21 the bearing-surface of the locking device as to rigidly retain the lifting-bar at any desired point of adjustment solely by the frictional contact of the bearing surfaces without the aid of notches or depressions in the surface of the lifting-bar. The arms *b* of the set-screw are of such length as to be easily grasped when desired to adjust the rod, and, owing to the leverage thus obtained upon the set-screw, it is very easily turned, and but slight power is required to permanently lock the heaviest transom either closed or at any point of adjustment. The upper end of the bar C is provided with a hole, J, for the reception of a hook, O, on one end of the link K. The hook O upon the opposite end of the link K engages in the hole M of the lifting-arm B.

It will be seen that by the simplicity of the construction of the lifting-bar and the link I am enabled to attach them to each other, without nuts or screws, simply by inserting the hooks through the holes in the upper end of the lifting-bar and transom-arm, thus

materially reducing the labor of attaching the lift; also that the single parts of the device may be packed and shipped separately, and when put up all the parts, including the keepers and transom arm, may be readily connected without the aid of skilled labor. All the parts are also made reversible, and may be attached to either side of the transom.

On transoms suspended by hinges at their upper edges the lifting-bar C projects above the upper keeper, D, and in order to resist the backward pressure upon the upper end of the lifting-bar, which is caused by the gravity of the transom, I preferably interpose between said lifting-bar and the door-frame the guideway-bar N, having lugs g', which serve as a bearing along which the upper end of the lifting-bar C moves, and against which it is caused to bear slightly as the transom is opened and closed. With transoms centrally pivoted the guideway N is not required, as the lifting-bar thus formed is sufficiently rigid to operate it without bending. The lower end of the lifting-bar is provided with any suitably-formed handle; but I prefer the form shown in Fig. 2, consisting of the rectangular pieces B′ B′, which are riveted to the respective flat surfaces of the lifting-bar. By this form of lift, in connection with the form of bar shown, it is impossible for the lifting-bar to be sprung sufficiently to bring the lift in contact with or to mar the door-frame.

Having thus described my invention, what I claim as new, and desire to secure by letters patent, is—

1. In a transom-lift, the combination, with the retaining-keepers affixed to the doorway, and the connecting-link of the transom, of the flat rectangular lifting-bar C, arranged edgewise to the door-frame, substantially as and for the purpose set forth.

2. In a transom-lift, the combination, with the lifting-bar as secured to the door-frame with one or more retaining-keepers, of a screw interposed between said bar and said door-frame and operating in a nut or socket set into said frame beneath said bar, substantially as set forth.

3. The combination, with the guide-bearing N, interposed between the upper end of the lifting-bar and the door-frame, of the bar-retaining lugs g', as set forth.

4. The combination, with the lifting-bar of a transom-lift, of one or more keepers, D, having vertical fastening plates a, horizontal rod-bearings b, and brackets d, provided with opening g, as set forth.

5. In a transom-lift, the combination, with the lifting-rod C, of two or more retaining-keepers, E, open at their base, screw F, and one or more bearings interposed between said lifting-rod and the casing, said screw F and said bearings serving as a rear support to the lifting-rod within said open keepers, as set forth.

In testimony whereof I affix my signature in presence of two witnesses.

CHARLES E. STELLER.

Witnesses:
JAS. B. ERWIN.
C. T. BENEDICT.

(No Model.)

A. ENGLISH.

TRANSOM LIFTER.

No. 331,289. Patented Dec. 1, 1885.

Fig. 1.

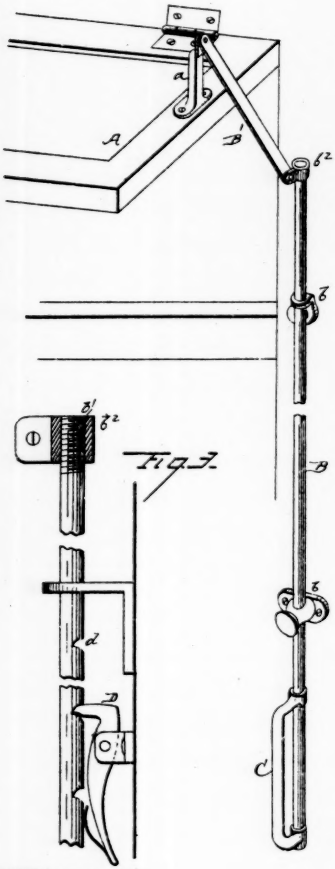


Fig. 2.

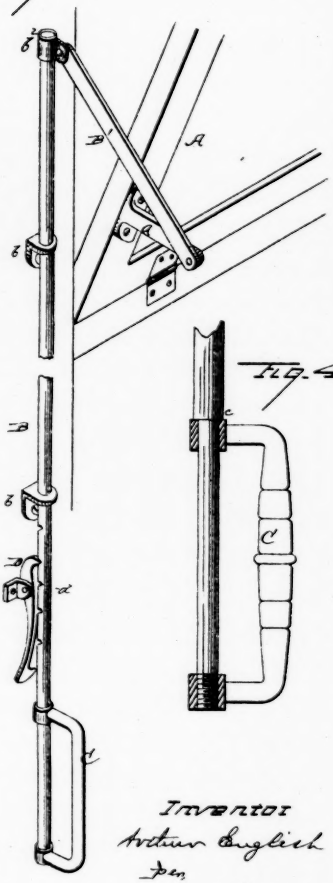


Fig. 3.

Fig. 4.

Witnesses
A. S. Van
H. C. McArthur

No. 150.
Wallbusat } pp. 244
v.
Saigus &c.

Inventor
Arthur English
per
H. Harrison
Attorney

23 UNITED STATES PATENT OFFICE.

ARTHUR ENGLISH, of Chicago, Illinois.

Transom-lifter.

Specification forming part of Letters Patent No. 331,289, dated December 1, 1885; application filed March 28, 1885; serial No. 160,472. (No model.)

To all whom it may concern:

Be it known that I, Arthur English, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented certain new and useful improvements in transom-lifters, of which the following is a specification, to wit:

This invention relates to an improvement in transom-lifters; and it consists in certain peculiarities of the construction and arrangement of the same, substantially as will be hereinafter more fully set forth and claimed.

In order to enable others skilled in the art to which my invention appertains to make and use the same, I will now proceed to describe its construction and operation, referring to the accompanying drawings, in which—

(Here follows diagram marked p. 24.)

Figures 1 and 2 represent my invention applied to transoms opening both up and down, and Figs. 3 and 4 are details of parts of the same.

A represents a transom of the usual form, hinged to its frame at either the top or bottom, as found most desirable, and provided with a small arm, *a*, secured to it, as represented.

B is the main rod of the lifter, secured to the door-frame by guide-lugs *b b*. To the upper end of this rod is secured by a screw-thread, *b'*, a lug, b^2, which is, by a hinged rod or link, B', connected to the arm *a* on the transom. The lower end of the lifter-rod is provided with a handle, C, which is screwed upon it against a shoulder, *c*, on the rod, which prevents it from slipping up too far on the rod. The action will be at once seen. The lifter-rod is lifted or lowered at will to open or close the transom, and secured at any desired point. In Fig. 1 the rod is secured by a set-screw; but I prefer to use the device seen in Figs. 2 and 3, where the lifter-rod is formed on its rear side with a series of notches, *d*, with which engages a spring-pawl, D, pivoted upon the side of the door-frame. This firmly locks the transom in any position, and is quickly and simply engaged and disengaged at will.

The device is readily attached to any transom, skylight, or similar device, and as the lug b^2 at the top of the lifting-rod is screwed on, it may be turned at any desired angle with the rod to suit the position in which it is to be placed. This is an important feature,

as much annoyance has been felt by a rigid connection at this point, which greatly limits the use of the device. This device obtains great leverage and opens the transom to its full extent.

Having thus fully described my invention, what I claim as new, and desire to secure by letters patent, is—

The lifting-rod B, screw-threaded at its upper end and provided with the lug b^2, the hinged connecting-rod B', the guide-lugs b, and handle C, in combination with the spring-pawl D, engaging a series of notches, d, in the rod, substantially as and for the purpose set forth.

In testimony whereof I affix my signature in presence of two witnesses.

ARTHUR ENGLISH.

Witnesses:
W. C. McARTHUR.
CHAS. KRESSMANN.

25 [Endorsed:] Case No. 14,103. Supreme Court U. S., October term, 1893. Term No., 150. John F. Wollensak, app't, *vs.* Sargent & Company. Stipulation to amend record. Filed Oct'r 24, 1893.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

No. 150.

JOHN F. WOLLENSAK,
Appellant,
vs.
SARGENT & COMPANY,
Appellee.

Appeal from U. S. Circuit Court,
District of Connecticut.

BRIEF OF ARGUMENT FOR APPELLANT.

EPHRAIM BANNING,
THOMAS A. BANNING
Counsel for Appellant.

EASTMAN BROS., LAW PRINTERS, 187 WASHINGTON ST., CHICAGO.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

No. 150.

JOHN F. WOLLENSAK, *Appellant,*
vs.
SARGENT & COMPANY, *Appellee.*

Appeal from U. S. Circuit Court, District of Connecticut.

BRIEF OF ARGUMENT FOR APPELLANT.

I.

STATEMENT OF CASE.

This is a bill in equity founded on two reissued letters patent, granted to appellant for Improvements in Transom Lifters, as follows: No. 9,307, July 20, 1880—original patent No. 136,801, March 11, 1873; and No. 10,264, December 26, 1882—original patent No. 148,538, March 10, 1874. Appellee is charged with infringing the third claim of reissue No. 9,307, and the third, fourth, fifth, sixth and ninth claims of reissue No. 10,264. A separate bill was originally filed on each reissue (2–19); but at the final hearing the two bills were consolidated. (123–24.)

In its answer to the first bill, and proofs taken thereunder, appellee attacks reissue No. 9,307, in the usual ways, but particularly for want of patentable novelty;

but infringement is not seriously denied. By its demurrer to the second bill, appellee raises the question whether reissue No. 10,264 was applied for in apt time, under the rule of *Miller* v. *Brass Co.*, 104 U. S., 350, and similar cases.

The consolidated cause was heard before his Honor Judge Shipman, who rendered a decision holding the third claim of reissue No. 9,307 to be void for want of patentable novelty, and the third, fourth, fifth, sixth and ninth claims of reissue No. 10,264 to be void because of delay in applying for the reissue; and pursuant to this decision a final decree was entered dismissing the consolidated bill for want of equity. (124.) To reverse this decree the present appeal is prosecuted.

Judge Shipman's two opinions, one on the motion for a preliminary injunction and one on the final hearing, are printed in the record (20–25, 120–23), and also reported in the Federal Reporter, the first in Vol. 33, p. 840, and the second in Vol. 41, p. 53.

II.

ASSIGNMENT OF ERRORS.

As his assignment of errors, appellant submits that the Circuit Court erred in the following particulars:

1. In holding the third claim of reissue No. 9,307 to be void for want of patentable novelty.

2. In not construing the third claim of reissue No. 9,307 to be for the specific form of transom-lifter shown and described, and in not holding that various features were sufficient, separately or together, to impart novelty and patentability to the construction as a whole.

3. In holding the third, fourth, fifth, sixth and ninth claims of reissue No. 10,264 to be void because of delay in applying for the reissue.

4. In not holding the delay in applying for reissue No. 10,264 to be sufficiently explained and excused by the allegations of the bill of complaint, showing the reasons therefor.

5. In entering a decree dismissing the bill of complaint for want of equity as to either of said reissues.

6. In not entering a decree in appellant's favor pursuant to the prayer of the consolidated bill of complaint as to both said reissues.

III.

REISSUE NO. 9,307.

Claim sued on Repeated from Original Patent.—As already stated, appellee is only charged with infringing the third claim of reissue No. 9,307. This is a claim repeated from the original patent; and, its only new claim having been heretofore disclaimed (97), the reissue is not obnoxious to the rule of *Miller* v. *Brass Co.*, 104 U. S., 350. See

Gage v. *Herring*, 107 U. S., 640, 646.
Sargent v. *Yale Lock Company*, 117 U. S., 553.
Gould v. *Spicer*, 15 Fed. Rep., 344.
Cote v. *Moffitt*, 15 Fed. Rep., 345.

Reissue Specification and Claims.—The reissue specification, which is substantially the same as the original, except as to one clause, which in view of disclaimer is now deemed immaterial, says:

> "Transom-lifters have heretofore been constructed with a long, upright rod or handle, jointed at its upper end to a lifting-arm, which extends to and is connected with the side or edge of the transom-sash, the sash being opened or closed by a vertical movement of the long rod. When thus constructed, the upright rod is liable to be bent by the weight of the

transom, owing to the want of support at or near the point of junction between the long rod and the lifting-arm.

"The object of my invention is to remedy this difficulty, and to such end it consists in providing the proper support, or support and guide, for the upper end of the lifting-rod during its vertical movements and while at rest. This may be accomplished in a variety of ways, one of which I will now proceed to describe in detail."

After some general remarks, the specification then proceeds to describe the invention, as follows:

"In the drawings, D is the door; T, the transom-sash, pivoted at top, bottom or middle, as preferred; A, the lifting-arm that connects the sash to the upright rod; U, the upright rod passing through two guides G G', one above and one below the point of junction with the lifting-arm; R, a friction roller, secured to the lifting-rod so as to bear against the wall and support said rod at its point of junction with the lifting arm; " ", notches cut in the upright rod to receive the end of the set-screw; and s, a set-screw arranged, in connection with the lower guide and the rod U, so as to be convenient of operation for the purpose of fixing the transom at any required angle. The upright rod is thus supported at three points—to wit, above, below, and at the joint where it sustains the weight of the transom. It can also be adjusted and securely fastened so as to open the sash as much or as little as may be desired, and to lock it in that position."

The reissue contains three claims (the first of which has been disclaimed), as follows:

"1. The combination, with a transom, its lifting arm and operating rod, of a guide for the upper end of the operating rod, to prevent it from being bent or displaced by the weight of the transom.

"2. The roller R, arranged at the junction of the lifting arm A and upright rod U in a transom-lifter, substantially as and for the purpose described.

"3. The guide G', arranged above the junction

of the lifting-arm and upright rod, in combination with the prolonged rod U, the guide G, and arm A, substantially as and for the purpose specified."

This Court's Construction of Invention.—The patent should, of course, be read in connection with the construction which this court put upon the invention in *Wollensak* v. *Reiher*, 115 U. S., 87, 94, as follows:

> "The specification of the complainant's patent undertakes broadly to describe the invention, intended to be embraced in it, as 'any construction, combination or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom.' But, having reference to the state of the art at the date of the alleged invention, and the claims of the patent, the patentee must be limited to the combination, with a transom, its lifting-arm and operating-rod, of a guide for the upper end of the operating-rod, prolonged beyond the junction with the lifting-arm so as to prevent the operating-rod from being bent or displaced by the weight of the transom. Putting by the question whether this is a patentable invention in view of the existing state of the art, the claim must be regarded as a narrow one, and limited to the particular combination described."

The first claim of the reissue, which is not in the original patent, is, broadly, for "a guide for the upper end of the operating-rod," etc., without special regard to its form or location; but, in view of the court's language above quoted, this broad claim has been heretofore disclaimed, and, in the words of the disclaimer, the patent is now limited "to the combinations and inventions set forth in the second and third claims of said reissue." (97.)

Expert's Explanation of Claim.—The third claim is thus explained by Mr. Bates, appellant's expert (37):

> "The third claim is a specific combination claim. Its elements, including those expressed and implied,

are (1) a transom window, arranged to swing vertically; (2) a bracket on said window, projecting outwardly and laterally therefrom to connect the window with its lifting devices; (3) a lifting-arm, hinged to said bracket; (4) an upright rod jointed to the lifting-arm, so that its vertical motion, acting through the lifting-arm and the bracket, will lift the transom, said rod being prolonged above its connection with the lifting-arm; (5) a guide and support G′ secured to the door jamb, embracing the upright rod above its joint with the lifting-arm, and serving to guide it in its motion and to support it away from the woodwork; (6) a guide and support G, near the lower end of the upright rod, performing the same functions there that the guide G′ does in its place, and provided with a set-screw to lock the upright rod, and with it the transom, at any desired point and sustain its weight there; (7) a third guide and support, located between G and G′ and constituting the third point of support, mentioned in the specification, for the operating-rod."

Reasons for this Construction.—As Mr. Bates here says, the claim sued on is "a *specific** combination claim." That it must be so construed is too clear for question—(1) because of its own language; (2) because of its relation to other claims; (3) because of the reissue proceedings in the Patent Office; (4) because of this court's construction of the invention, and (5) because of appellant's disclaimer.

As to the first three of these points, it will be noticed that the first claim is generic and the other two specific, and that reference letters are not used in the first claim, but are in the second and third. The first claim speaks generally of "its lifting-arm and operating.rod;" the third refers to these parts specifically as "*the* prolonged rod U . . . and arm A." The first claim speaks

*Wherever they occur, italics may be considered as ours, unless otherwise explained.

generally "of *a* guide for the upper end of the operating-rod;" the third claim refers specifically to "*the* guide G'." The first claim says nothing about a lower guide or locking device; the third claim refers to these parts specifically as "*the* guide G." The first claim omits all words of limitation; the third requires its combination to be "substantially as and for the purpose specified."

To say that the third claim is not specific is to say that it covers exactly the same subject-matter as the first claim, in which case this language of Judge Acheson in *Tondeur* v. *Stewart*, 28 Fed. Rep., 561, 564, is applicable: "To adopt the defendant's construction would be to make two distinct claims of the patent cover, not different things, but one and the same thing—a result to be avoided, if possible." This language was referred to approvingly by Judge Jackson, now Justice Jackson, in *Page Woven Wire Fence Co.* v. *Land*, 49 Fed. Rep., 936, 942, where the same rule of construction was applied.

To say that the third claim is not specific is also to ignore the meaning of the definite article and reference letters used therein. In *McCormick* v. *Graham*, 129 U. S., 1, 9, the court attached importance to the fact that "in the second claim the word 'the' was always prefixed to the enumerated elements composing the combination claimed." Although reference letters are not always to be construed strictly—they are often used merely to designate parts—still they should be so construed when their omission from one claim and use in another constitutes the distinguishing difference between the two claims. In such case, they are not used merely to designate parts, but by way of limitation to specific forms or features. When so used, they bring a claim within the rule of construction thus stated by Justice Jackson in *McCormick*

Harvesting Machine Co. v. *Aultman*, 64 Off. Gaz., 1793:

> "The several elements which go to make up the combination of this third claim (as of the other claims relied on), are mentioned specifically and by reference letters. Such specific reference operates to confine and restrict the claim to the particular devices described."

See also:

Weir v. *Morden*, 125 U. S., 98, 106.

Hendy v. *Miners Iron Works*, 127 U. S., 370, 375.

Bunching Machine Co. v. *Williams Co.*, 44 Fed. Rep., 190, 193.

It must be clear, from the way in which these claims are drawn, that the first one was intended to be broad enough to cover any form of transom-lifter of the general kind shown, having "a guide for the upper end of the operating-rod," etc., and that the third one was intended to be limited to the specific forms described and shown; and it is apparent that they were so understood when the reissue was taken out. In his argument before the Examiners-in-Chief—at which time the present third claim was designated as the fourth—appellant's solicitor clearly pointed this out, as follows: "There is this difference between the 1st and 4th, that one is generic and the other [limited] to special devices. Under such distinction I have yet to find the decision of the Office or courts in which two claims are given equal scope." (94.) And the very object of the reissue was to obtain a broad claim, the others being considered specific.

IV.

THE PRIOR ART.

Old Device Admitted in Patent.—As far as known outside of the patent, the prior art, in the line of tran-

soms, consisted of cords and pulleys, a loose or hinged stick, a boot-jack, etc.; but, as none of these devices make as near an approach to the invention as the construction admitted in the patent itself, it is not necessary to give them further consideration.

The acknowledgment of the prior art contained in the patent (in the paragraph following description of the drawings) is vague and indefinite. As to various parts it is silent, and to others uncertain. For instance, it does not describe any kind of guides, much less guides also made in the form of "supports" to hold the rod out from the casing. As to this Mr. Bates says:

> "It does not appear that any kinds of guides were used or how they could be used; but even if it did contemplate guides, they might be straps, like Bayley & McCluskey, but would hardly be supports at all." (38.)

Nor does it refer to any locking device to hold the transom open. As to this Mr Bates says:

> "It does not refer to any locking device. As a boot-jack or shingle were the only known forms of locking devices for transom-lifters at that date, they are probably the kinds contemplated, if any. They were the only kinds known to me or shown by the exhibits in this case." (38.)

Again, although it speaks of an upright rod jointed to a lifting-arm, which is connected to the transom sash, it does not state what kind of lifting-arm is used or how the connection is formed. As to this Mr. Bates says:

> "It is called a lifting-arm, and it is said to be connected to the side or edge of the sash. It might have been a pin, or the bracket shown in the reissue, in which case the whole transom-lifter would consist of this bracket and a rod, or broom-stick, hanging down loosely from it. The description is not sufficient to show what was the construction or what

were the functions of the device referred to. It is like saying that an animal with a tail existed. That does not describe bird, beast or fish, or even what kind of a tail it had." (38.)

In this view, the acknowledgment of the prior art contained in the patent falls within the rule of *Seymour* v. *Osborne*, 11 Wall., 516, 555, as follows:

> "Mere vague and general representations will not support such a defense, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use." See, also,
>
> *Cohn* v. *U. S. Corset Co.*, 93 U. S., 366, 370.
>
> *Dornton* v. *Yeager Milling Co.*, 108 U. S., 466, 471.

Old Device an Abandoned Experiment.—In any view, and without regard to vagueness, there are many and material differences between the prior device admitted in the patent and the specific combination in suit. In the old device the lifting-arm was apparently pivoted to the end of the operating-rod and to the transom sash, but it is not stated how the connections were formed; if any guides were used, as to which we are not informed, they were not necessarily so constructed as to "support" the rod out from the jamb, but were necessarily below the lowest point of movement reached by the lifting-arm, so that there must have been a long unsupported rod, or section of rod, between the lowest and highest limits of movement of the upper end of the operating-rod; and there was no locking device "for the purpose of fixing the transom at any required angle."

One of the difficulties in the way of this prior device, and which of itself must have rendered it practically inoperative, was that, as the rod moved up, the weight of

the transom would cause its upper portion to vibrate or sway from side to side, and this rubbing or cramping of the rod would of course cause it to bind in its guides, and to scratch or discolor the casing; and in a short time the rod would become permanently bent so as to be incapable of ready movement, and wholly inoperative.

If it be kept in mind that the operating-rod is required to *lift* the weight of the transom, and that this weight is sometimes as much as five or six hundred pounds, (55, 62) it will be apparent that, as just suggested, this device must have been a failure. But the evidence on this point is overwhelming, so overwhelming, in fact, that appellee has not even attempted to dispute it. This evidence may be thus summarized:

Appellant, considering what the effect would be if there was no guide above the junction of the lifting-arm with the operating-rod, says "that in lifting the weight the upper end of the rod would bend in and out, according to how the transom was hinged, and if hinged in some ways would be absolutely dangerous—that is to say, the weight of a transom could not be sustained by the lifter unless it were made in a size out of proportion, and then the cramping and guides would still remain, which makes the rod move up and down hard;" that "it would not be practical;" that "it would be a transom-lifter only in name;" and that "all these difficulties would have to be put up with, such as the bending of the rod, the wearing away of the door-frame by the upper end of the rod, and the sliding of it laterally." (55, 56.)

Mr. Wilkes, appellant's superintendent, says: "If the transom was hinged at the top it would have a tendency to push the rod inwards and rub against the casing. If it was hinged at the bottom it would have a tendency to bend the rod outwards, or probably drop the transom

from its weight. It would be rather dangerous, and so I would hardly consider it practical." (61.)

Mr. Bates, appellant's expert, says that "the failure referred to in the specification, in speaking of some prior device, would rather discourage than encourage further effort;" and when asked, on cross-examination, whether the patent describes these prior devices as failures, he says that "it mentions them in connection with the defect in operation which would make them failures," and that this would necessarily be so "in practical use." The reason he gives for this view is "that the upright rod would bend and mar the woodwork and bind in its guides, so that it could not be operated." (40, 44, 45.)

Mr. Jenney, a practical architect, says that the upper guide increases "the steadiness of the movement;" that to some extent it "prevents the operating-rod from binding or cramping in the lower guide when such rod supports the weight of the transom, . . . particularly if the transom is a very heavy one and the operating-rod a light one;" that if the transom were hung at its lower end "it would cause the operating-rod to spring or bend if the transom was a heavy one," and that in such case it might become "practically inoperative." (71-2.)

Mr. Sherman, a carpenter and joiner, says that the upper guide "is to steady the rod to hold it in its place;" and that, without it, "the operating-rod would bend and twist," and "would not operate." (73.)

Mr. Bauman, a practical architect, says that when lifting the weight of the transom there is a "lateral strain or pressure on the lifting-rod;" that if there were no upper guide the effect would be to "bend the operating-rod against the door-facing;" that under such circumstances the lifter would not be "practically operative . . because it would scratch the pane and stop there;" that "it

would bind in the guides," and that the upper guide "is very essential." (82.)

Mr. Pennington, an experienced carpenter and builder, says that the upper guide "is a part that is indispensable; it would not work without it to any advantage." (88.)

Mr. Grannis, also an experienced builder, says that the upper guide is "necessary to the smooth and even working of the device;" that without it he thinks there would be "a practical defect in the machine;" that when moving up it would press in "and cause friction; it would not work near as easy;" and that he "would hardly call it a successful operating device." (90.)

Eight witnesses thus testify to the impracticability of the device referred to in appellant's acknowledgment of the art, *and not a single witness testifies to the contrary.* But this is not all; appellant, waiving technicalities, expressly invited appellee to give this subject the fullest possible investigation. Accordingly, this offer was entered of record:

> "It appearing somewhere in the record that the construction disclaimed in the acknowledgment of the art in the Wollensak specification was at one time used in the room occupied by the Examiners-in-Chief of the Patent Office, counsel for complainant now offers, notwithstanding the defendant's evidence has been long since closed, to permit the taking of the deposition of any one or more of said Examiners-in-Chief to show any facts which they may know in reference to their construction and operation, provided that the same be taken speedily, so as not to delay the hearing." (62.)

But, notwithstanding this offer, appellee's counsel, on the ground of "expense," declined to take the depositions of any of the gentlemen referred to. Is not this significant?

However, the Examiners-in-Chief, with the device be-

fore them, in the only place in which any attempt to use it is shown to have ever been made, did not consider it sufficient to anticipate the patented invention, or even to prevent the allowance of a much broader claim than the one now sued on. Their decision, with the old device thus before them, is the strongest possible statement of the results of their observation and experience, and is entitled to greater weight than any testimony which they could now give if called as witnesses. And so, although appellee's counsel has declined to take their depositions, their decision, which is in the case (95), is entitled to great weight—much greater than if the device had not been thus before them—on questions touching its capability of practical operation.

Under these circumstances—the Examiners-in-Chief and appellant's witnesses all agreeing that the prior device must have been practically inoperative, and appellee not having taken any evidence to the contrary, but having expressly declined to do so—how can it be said that such device ever amounted to a perfected or operative invention, or to anything more than an abandoned experiment?

> "The invention or discovery relied upon as a defense must have been complete, and capable of producing the result sought to be accomplished; *and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him.* . . . The law requires not conjecture, but certainty." *Coffin* v. *Ogden*, 18 Wall., 124.
>
> "If the evidence, however, raised a doubt, which we think it does not, *such doubt, it is well settled, should be resolved against the respondents, upon whom rests the burden of proof.* (*Coffin* v. *Ogden*, 18 Wall., 120.) This rule is founded in justice and good sense. The patent is *prima facie* valid. It is a muniment of title. He who would overcome it

must do so by a clear preponderance of evidence." *Comstock* v. *Sandusky Seat Co.*, 3 Banning & A., 188, 190.

"The machine of Finn must have been *a practical machine, capable of performing the object* of the maker." *Case* v. *Brown*, 2 Fisher, 272.

"Proof of prior experiments on the principle of this invention, *if not carried on to completion*, does not make out the fact of prior knowledge or use, within the meaning of the patent laws. The machine or structure alleged to be similar to that patented, *must have been so far perfected as to be of practical utility.*" *Wayne* v. *Holmes*, 2 Fisher, 28.

"This part of the case, however, is easily disposed of, as the proof by witnesses familiar with the subject is, that the devices set forth in the Mason patent are inoperative, impracticable and worthless." *Harwood* v. *Mill River Woolen Manufacturing Co.*, 3 Fisher, 528.

Under the circumstances stated, the old device being at most a mere abandoned experiment, which never reached the point of practical utility, and has never been heard of in the market, *it cannot even have the effect of depriving appellant of the merit of having invented the entire lifter.* In other words, the old device should be treated as if it never existed, and appellant should be allowed the same consideration as if it never did exist. The old device—the failure of which Mr. Bates says "would rather discourage than encourage further efforts"—was never patented, and has never been heard of except through appellant's own admission; and so, in this respect, the case is much stronger than *Whitely* v. *Swayne* (7 Wall., 686), in which the old device was covered by a patent. And yet in this Whitely case the court said:

"The plaintiff's title, and the one upon which he must succeed against the defendant, if he succeeds at all, rests upon a patent for improvements in a machine for harvesting clover and grass seed, which

improvements, after a full and fair trial, resulted in unsuccessful experiments, and which were finally abandoned. They never went into any useful or practical operation, and nothing more was heard of them from Steadman or any other person for a period of six years. . . . Clearly, if any other person had chosen to take up the subject of the improvements where it was left off by Steadman, he had a right thus to enter upon it, and if successful would be entitled to the merit of them as an original inventor, for he is the first inventor, and entitled to the patent, who, being an original discoverer, has first perfected and adapted the invention to actual use."

In *Goodyear* v. *Day*, 2 Wall., Jr., 299, Justice Grier said:

"Many experiments may have been unsuccessfully tried, coming very near, yet falling short of the desired result. They have produced nothing beneficial. The invention, when perfected, may truly be said to be the culminating point of many experiments, not only by the inventor, but by many others. He may have profited indirectly by the unsuccessful experiments and failures of others; but it gives them no right to claim a share of the honor or the profit of the successful inventor."

This rule is also well stated in *Union Paper Bag Machine Co.* v. *Pultz & Walkley Company*, 3 Banning & A., 408, as follows:

"*The patentee is not, however, necessarily limited in his patent to the narrow field between the model of his predecessor and his own perfected machine*, for his invention may have actually covered a wider field, and may have included the territory which the previous investigator undertook to occupy and abandoned. The patentee has the right to take up the improvement at the point where it was left by his predecessor, and if, by the exercise of his own inventive skill, he is successful in first perfecting and reducing to practice the invention which his prede-

cessor undertook to make, he is entitled to the merit of such improvement as an original inaentor. *Whitely* v. *Swayne*, 7 Wall., 685."

These last authorities, and others, are referred to approvingly by Judge Blodgett in *Whittlesey* v. *Ames*, 5 Banning & A., 102–3, in which the same rule is applied.

V.

SPECIAL POINTS OF NOVELTY.

But, even conceding ererything that can possibly be claimed in favor of this prior contrivance, it can still be said that it falls short of the patented invention in all the respects in which improvement is claimed.

Support Holds Rod out from Casing.—In the first place, appellant's operating-rod is "supported" away from the door casing. As stated in the patent, one difficulty with the previous experiment, sufficient to account for its failure, was that "the upright rod was liable to be bent by the weight of the transom *owing to the want of support* at or near the junction between the long upright rod and the lifting-arm." The object of the invention is expressly stated to be "to remedy this difficulty;" but this could not be effectually done by merely supporting the rod against sidewise swaying—that is, by merely guiding its vertical movements. The rubbing of the rod against the casing would still be a serious objection, inasmuch as it would interfere with its vertical movements and mar and discolor the casing. In this respect, therefore, the invention "consists in providing the proper support, or support and guide, for the upper end of the lifting rod during its vertical movements and while at rest;" in other words, it consists in providing a "support" that will hold the rod out from the woodwork

as well as prevent its sidewise swaying. The rod is therefore set out, as shown in the drawings.

It will be understood, then, that the new upper guide holds the rod out of contact with the casing, and it is not, therefore, a mere guide, but it is a *support*, operating when the handle-rod is moved, to keep it away from the casing, and thus prevent marring or scratching or metallic discoloration by the upper end of the rod; and while the rod is at rest, as a permanent support for it, and for the weight of the transom when thrown on it. It is, therefore, a support in two senses—first, to keep the rod away from the casing, and, second, to keep it from bending in any direction; and, in addition to all this, it is a guide for the vertical movements of the rod.

This manner of supporting the rod, **so as to hold it out from the casing and at the same time prevent sidewise swaying,** *was absolutely new with appellant.*

Requirements as to Operating Rod.—The operating rod, in order to be cheap, sightly and merchantable, must of necessity be small, and, being set out by the guides, it would be liable to bend at *two* points—above the guide placed below the junction of the lifting-arm and operating-rod, and in the long portion below such guide—and this would be especially so if the rod were long or used with heavy transoms. In order to avoid the first of these bendings, the new guide support at the top is introduced; and, in order to avoid the second, a coupling or bracket is made to extend back to the casing, which, in the form shown, is provided with an anti-friction roller, but which, so far as regards the third claim, may be in other forms. "The upright rod is thus supported at three points—to wit, above, below and at the joint where it sustains the weight of the transom."

This manner of supporting the rod, **at the three points which receive the greatest strain,** *was absolutely new with appellant.*

Prolonging Rod and Coupling it to Lifting Arm.—The next point of departure from the old device is in the manner of connecting the handle-rod with the lifting-arm and with the upper guide. This is done, first, by the use of a bracket or coupling, which enables the lifting-arm to be attached to any suitable point along the length of the rod, and, second, by prolonging the rod a sufficient distance above this junction bracket, to enable it to be held out from the casing, and supported in its vertical movements in a guide or guide-way. This addition to the prior art is an important one, for several reasons: It enables the lifting-arm to be supported upon and operated by a light handle-rod; it prevents any of the parts from getting out of place; it permits of an easy and certain movement and gives the device a steadiness in operation which it otherwise could not have.

This manner of uniting the lifting-arm and operating rod—**by a coupling grasping the rod in its middle portion**—*and* **this prolonging of the rod above its point of junction with the lifting-arm,** *were absolutely new with the appellant.*

Locking Device.—Another point of departure from the device admitted in the patent is in providing a peculiar form of *lock* to fix and hold "the transom at any required angle." This locking device, both in construction and operation, is an important feature. As one of the witnesses says, the device is a "lifter and lock combined" (64); but, more than this, it is a lifter having a peculiar kind of lock—a set-screw forming a part of the lower guide.

This form of locking device, *or, indeed,* **any form of lock for transom-lifters,** *was absolutely new with appellant.*

Reversible and Projecting Bracket.—Another point of novelty is to be found in the manner of connecting the lifter to the transom sash. This is done by a reversible bracket, extending outwardly and laterally, and forming a part of the lifting-arm; and this lifting-arm or bracket not being described in appellant's acknowledgment of the art, or shown in any of appellees' prior patents, we say—

This manner of connecting the lifter to the transom sash—**by an arm having a reversible and outwardly and laterally projecting bracket**—*was absolutely new with appellant.*

In short, then, the patented lifter differs from the device admitted in the appellant's acknowledgment of the art, (1) in having *an upper guide;* (2) in having proper *supports* to hold the rod out from the casing and direct its vertical movements, and in having these supports "*at three points*, to wit, above, below, and at the joint where it sustains the weight of the transom;" (3) in having its operating-rod constructed in a peculiar way—that is, *prolonged* and *connected to the lifting-arm from its body*, instead of at its end; (4) in having a *peculiar form of locking device*, to hold "the transom at any required angle;" and (5) in having a *peculiar form of lifting-arm* to connect the operating-rod to the transom sash.

Further Suggestions as to Operating-Rod.—As to the handle-rod, it is also to be noticed that so far as shown, appellant's invention is the first instance in mechanics "in which a light, slender rod was used for the purpose of lifting or pushing up a heavy weight." (36.) Nor is

any instance shown where a light, slender rod was previously subjected to a severe lateral strain.

Mr. Wilkes says that, as he should judge, transoms sometimes weigh "five or six hundred pounds." (61.)

Appellant says: "Transoms will sometimes weigh as much as five hundred pounds. For heavy transoms two lifters are usually employed—one on each side, and, if the transom is very heavy, sometimes it takes two men to raise and lower it. The lifter must be strong enough to sustain this weight, and the weight brought to bear so as to make the lifter work as easily as possible." (55.)

From this, it must be apparent that the idea of *lifting* the weight of the transom by a light, slender rod is a material one in considering the problem appellant had to work out; but this need not be left to inference, as the record contains positive and satisfactory proof.

Mr. Bates says that "the idea of lifting is material in the Wollensak reissue," and that "the lifting devices have to be light and elegant, rather than heavy, both for appearance sake, and also because they have to be lifted with the transom." (36.)

The patent itself shows this to be true. Its title is "Transom-*Lifter;*" all the way through the specification it speaks of "lifting;" its operating-rod is repeatedly called an "upright" rod, and is referred to as "*sustaining the weight* of the transom." Speaking of the device admitted to be old, it says that the "rod was liable to be bent by the weight of the transom," and that to remedy this was one object of the invention.

In his testimony, appellant thus refers to this matter:

> "The difficulties that I ran against in making my first models, in experimenting, were in providing against the transom that was heavy, in lifting it, and arranging the rod so as to be held out from the

> woodwork, and so as to make proper connection with the transom. All these things had to be studied, which took time and experimenting. . . . I had no basis to start out with. I had everything to learn. I hardly know myself how I finally got it into a perfect state. It came by degrees. . . . I had to provide guides at proper points to support the rod and prevent the rod from being bent by the weight of the transom. I had to provide suitable means for holding the transom in position when open or closed, or in any position, so that the rod could be placed at any desirable point on the casing, and held out from the woodwork so as not to mar the wood in its movement, and altogether make it as light as possible and neat in appearance, so as to make it a salable article, and still have it strong enough to answer the purpose." (53–54.)

Nor is other evidence wanting to show the importance of this function. After a year's trial, appellant finds that, when hinged in a particular way, the bending pressure of the sash is too much even for his strongly supported operating-rod; and so in his second patent he provides "means for supporting the upright rod against the bending pressure of the sash when the latter is hinged at its bottom"—for this purpose employing a spiral spring "to sustain the weight of the sash when it is lowered, and prevent any sharp concussion when the transom falls suddenly." (17.) Still later, after three or four year's trial, he finds it necessary, in certain cases, to employ a shouldered lug and slotted plate to take the strain, caused by the bending pressure, entirely off the rod. (25.) And, finally, after many years' trial, he advises the trade, by advertisements in appellee's catalogues, that "Extra Heavy Transoms, when Hinged either at Top or Bottom, should have a lifter on each side." (Opposite page 58.)

The record also shows that even in late years, other inventors have struggled with this problem. The Steller

patent of May 5, 1885, describes a lifting-bar "formed of a single piece of flat metal which is arranged edgewise to the door-frame and transom, so that the strain of lifting the transom is brought to bear against the edge of the bar whereby it is . . . capable of supporting a much heavier weight in proportion to its heft than the ordinary round rods heretofore used." By this construction, it is said, "it is impossible for the lifting-bar to be sprung sufficiently to bring the lift in contact with or to mar the door-frame." It thus appears that more than twelve years after appellant's patent was issued, other inventors considered the question of lifting a heavy weight by a light, slender rod as still an open one. How, then, can it be said that appellant is not entitled to special consideration on account of this function in his invention?

It is also noticeable that only a small part of the total strain upon the rod is represented by the compressive strain caused by the downward thrust of the transom. Between the middle and upper guides the strain becomes a lateral thrust; and when this strain is applied at its most disadvantageous point the rod is in the position of a short beam supported at both ends and loaded at its center. But, as is well known, the lateral strength of metal is much less than its crushing or compressive strength. Thus, an ordinary fifteen inch I-beam, six feet long, if secured against sidewise yielding, will resist an ultimate crushing strain of 525,000 pounds;* while, if the same beam is supported at both its ends, it will only resist an ultimate lateral strain at its center of 65,000 pounds.†

*Haswell's Mechanics and Engineer's Pocket-Book (edition of 1887, page 765) gives the ultimate crushing strength of Bessemer steel as ranging from 50,000 to 66,200 pounds per square inch. We have taken the lower figure.

†This is in accordance with the tables contained on page 7 of "Use-

Treating the position of the rod between the middle and upper guides as a beam, supported at both ends, and comparing it with the same portion of rod without an upper guide—which is then a mere cantilever—we find that, *under the same load*, the bending or deflection of the rod without the upper support is several times as much as it is when such support is used.

But considering the peculiar and varying conditions always existing in the use of transoms—the differences in position, weight and manner of hanging, and the variations in strain or pressure due to the operations of opening or closing—appellant could not determine how to place or support his rod by mathematical tables or ordinary mechanical methods. He had a peculiar problem to work out—different from anything shown as previously existing in mechanics—and he solved it by placing and supporting his rod in a peculiar way, so as to enable it to perform *a peculiar and entirely new function*—**lifting against both crushing and lateral strain.**

In view of all this, it will be readily seen that—

The employment of a light, slender rod **for the purpose of lifting a heavy weight, and particularly for the purpose of sustaining a severe lateral strain,** *was absolutely new with appellant.*

Further Suggestions as to Locking Device.—As to the locking device, it is also to be noticed that appellant's invention is the first instance in mechanics "in which a set-screw was employed for the purpose of holding up a weight in any desired position." (36, 54.)

As to this feature, appellant says that in his first model he employed a pin, inserted through the rod, but adds:

"I soon found that that was not very neat in ap-

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ful Information for Engineers, Architects and Constructors," issued, in 1887, by the New Jersey Steel & Iron Company, of Trenton, N. J.

pearance, certainly not ornamental, besides it had a tendency to weaken the rod on account of having to drill holes for the pin. This made the rod liable to be broken off, particularly when the transom was closed; the lower free end of the rod projecting below the lower guide made it easy to break the rod at one of the holes. That suggested the set-screw and also doing away with having to drill the rod for the pin. This change made the rod strong where it was weak, and gave the lower guide a neat appearance. I found that set-screws were being lost to such an extent that it became a source of annoyance to me and my customers, and a source of expense to me—they would sometimes get lost in shipping. I then got up an improved set-screw, which I now use, as shown in my transom-lifter introduced in this case, which I patented June 5, 1883, No. 278,759." (54, 57.)

Other inventors have also sought to improve upon the means of locking and holding up the transom, or fixing it "at any required angle." The Steller patent of May, 1885, shows a locking set-screw interposed between the lifting-bar and casing, which "serves as a supporting-bearing to the lifting-rod and prevents it from coming in contact with the door frame," and which when turned outward "bears against the inner edge of the lifting-bar" to lock it in any desired position. The patentee says that by this improvement he has "so increased the bearing surface of the locking device as to rigidly retain the lifting-bar at any desired point of adjustment solely by the frictional contact of the bearing surfaces, without the aid of notches or depressions in the surface of the lifting-bar."

The Arthur English patent of December, 1885, shows two forms of locking devices, one being appellant's set-screw, and the other a spring pawl pivoted upon the side of the door frame and adapted to engage with a series of

notches on the inner side of the lifting-rod. The patentee says that he prefers the spring pawl, which "firmly locks the transom in any position, and is quickly and simply engaged and disengaged at will."

In view of this, can it be said that invention was not involved in the making of this feature and combining it with other parts in the peculiar way shown? If so, let it be said with full knowledge of the fact that—

The employment of a set-screw **as a lock for transom-lifters, or for the purpose of holding up a weight of any kind,** *was absolutely new with appellant.*

VI.

TRUE CONSTRUCTION OF THIRD CLAIM.

It is perhaps immaterial whether, in a technical view, all the features above specified form elements of the claim sued on or not. They may certainly be considered in determining the nature of the problem appellant had to work out, and the consequent merit of his invention; and, when so considered, they show, beyond question, that the problem was by no means a simple one, and that thought, ingenuity and experiment—in a word, the exercise of the inventive faculty—were necessary in its solution.

It is believed, however, that all the features above mentioned are, expressly or by implication, elements of the third claim sued on. The only ones about which appellee seems to make any question are, the reversible bracket, middle support and locking device. That these features are positive elements of the claim seems clear from the following considerations:

The Middle Support.—The middle support is not expressly mentioned in the third claim, but the drawings

show three supports—one at the point of junction between the lifting-arm and upright rod, one above and one below such point—and the specification says that "the upright rod is thus *supported at three points, to wit, above, below and at the joint where it sustains the weight of the transom.*" As less than three supports is not shown or suggested, and as the third claim sued on was intended to be specific for the entire lifter, it is certainly not an unreasonable view to say that, by fair implication, the middle support forms an element of its combination.

Mr. Bates says that this middle support should be treated as an element of the claim, "because the specification says that the upright rod is supported at three points;" but he adds that it is not necessarily a material element in all cases. In different words, he says that "the middle guide may be treated as an element, and should be treated as one, if necessary to save the claim;" and "that it might be construed into the claim or not at the option of the construer, but certainly should be construed into it if necessary to save the patent, which is clearly a meritorious one." (37, 41, 45, 48.)

As to the form of the middle support, however, Mr. Bates says:

> "As it is not specifically described or referred to by letter, I understand that some latitude is allowable as to its form. . . . The second claim would be limited to the specific form of middle guide, with its roller R travelling with the rod—necessarily so on account of the language of the claim—while the third claim would not be limited to any specific form of middle guide, provided only that said guide would support the upright rod." (41, 46.)

In answer to the question whether the middle support

should not "be located at the point specifically mentioned in the specification," Mr. Bates says:

> "No, because the patent indicates that that exact point is not necessary in the third claim, by making it necessary in the second." (48.)

The Reversible Bracket.—Although the bracket is not expressly mentioned in the third claim, it is included as a part of the lifting-arm. The specification says that "A is the lifting-arm that connects the sash to the upright rod"—no separate reference letter being used to designate the bracket—and the claim expressly calls for the "arm A" as an element of its combination. The bracket is absolutely necessary to "connect the sash to the upright rod," and clearly forms a part of the lifting-arm—the part connected to the transom sash. It is, therefore, included in the claim as a part of the "arm A." (41, 48.)

The Locking Device.—The locking device is certainly an element of the third claim, (1) because of the language of the patent, and (2) because of the necessities of the case.

In the preamble of the patent the invention is called an improvement in "Transom-Lifters and *Locks*." The specification describes the lock as "*a set-screw arranged in connection with the lower guide* and the rod U, so as to be convenient of operation *for the purpose of fixing the transom at any required angle.*" It also says that the operating-rod can "be adjusted *and securely fastened* so as to open the sash as much or as little as may be desired, *and to lock it* in that position." In the drawings "the lower guide" is designated as G, and the set-screw is shown as forming a part of it. In the third claim, "the guide G" is expressly made an element.

Mr. Bates says that he considers the locking device an

element of the claim, because "it is a part, and an important one, of the lower guide and support G;" that the guide G is "provided with a set-screw to lock the upright rod;" that "the words 'the guide G' in the claim include the set-screw, as it is an important part of that guide;" and that, "as to the bracket and set-screw, they are referred to in terms in the claim, the set-screw being a part of the guide G, and the bracket being a part of the lifting-arm." (37, 45, 48.) This is certainly a reasonable and proper construction; and, in view of the fact that the locking device is not mentioned or referred to in either of the other claims, it is the only construction that gives effect to the entire patent and effectuates the entire object of the patentee. If the locking device is not covered by the third claim, then it is not covered at all, and the reference to improvements in "locks" and the description of the locking feature amount to nothing.

> "If the patentee specifies any element as entering into the combination, either directly by the language of the claim, *or by such a reference to the descriptive part of the specification as carries such element into the claim*, he makes such element material to the combination, and the court cannot declare it to be immaterial." *Fay* v. *Cordesman*, 109 U. S., 408, 420.

In this connection, it should also be remembered, in the words of Justice Grier, that "the construction should be that which is most favorable to the patentee *ut res magis valeat quam pereat*" (*Corning* v. *Burden*, 15 How., 269); and, in the words of Chief Justice Fuller, "that elements of a combination not mentioned in a claim may sometimes be held included, in the light of other parts of the specification, which may be applicable." *Day* v. *Fair Haven & Westville Railway Company*, 132 U. S., 98, 102.

"Liberality as often shows itself in a narrow construction as in a broad one; for a narrow construction may be as necessary to establish the novelty of a patent as a broad construction is to lay the foundation for proof of its infringement. Therefore, when it becomes necessary to construe a claim narrowly in order that its novelty may not be negatived by the prior art, courts will give such a narrow construction, if they can do so consistently with the language of the claim and of the description." Walker on Patents, Sec. 185.

"The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language which he has employed." *Klein* v. *Russell*, 19 Wall., 433, 466.

"It is allowable to construe the claims of a patent with reference to what has gone before, and give the patentee the benefit of the restricted claim which results from such construction." *Jones* v. *Barker*, 11 Fed. Rep. 597, 600.

Under these authorities, appellant submits that if the locking device be considered necessary to the novelty and patentability of the invention, it should be treated as a part of the claim. "Liberality as often shows itself in a narrow construction as in a broad one."

Again, the third claim is directed to the entire lifter, not to a special part or feature; and of course it must be construed as covering an operative combination. In this view, the necessities of the case require a construction which will make the locking device an element by implication. The rule applicable to this subject has been thus stated:

"It is undoubtedly correct that a combination must contain all the essential elements necessary to secure some distinct and definable result in the operation of a machine, and such result may be called, for want of a better term, *unitary*. It is

only necessary to inquire whether this is done to determine, in any given case, whether the combinations claimed are proper or not." *Ex parte Rheutan*, 5 Off. Gaz., 522.

"A claim must always be interpreted by the specification, and parts of the structure essential to its completeness, or some known equivalent of those parts, must be understood, if omitted in the terms of the claim. Such an interpretation is not unnecessarily to be put on a claim as would render the alleged invention useless without reorganization." *Ex parte Richardson*, 7 Off. Gaz., 1054.

In *Haskell* v. *Shoe Machinery Manufacturing Company*, 3 Banning & A., 553, 5, the claim sued on was in these words:

"The arrangement of the isolated upright post C, with the notched movable plate F, in the manner and for the purpose shown and described."

In considering this claim, Justice Clifford said:

"Construed as the claim should be in connection with the descriptive portion of the specification which precedes, it is clear that the combination described is special, including not only the isolated post and the movable plate, but also the double arrangement by which the two described kinds of work may be successfully accomplished in the same machine. Examined in that light, the court is of the opinion that the machine is a highly useful one, and one that deserves to be favorably considered by the court."

By this construction Justice Clifford imported into the claim "the double arrangement," etc., which was not mentioned in it, and certainly not called for to anything like the extent that the locking device is called for by appellant's claim.

In *Klein* v. *Russell*, 19 Wall., 433, 467, the first claim sued on was for "the employment of fat liquor in the treatment of leather, *substantially as specified*."

After quoting the claim, and italicising its closing words as above, and after saying that the heated condition of the liquor was distinctly specified, the court say:

> "A chemist proved on the trial that heat was an element essential, in a large degree, to the efficacy and utility of both the simple liquor and the compound, when so applied. We think the better opinion is, that the first claim was intended to cover, and does cover, only the use of heated liquor."

In this case, although the word "heated" was in no way used in the first claim, the court construed it as calling for *heated* fat liquor, because "heat was an element essential . . . to the efficacy and utility" of the compound. Does not the present case present stronger reasons for treating the locking device as an element of appellant's claim?

In *Clements* v. *Odorless Apparatus Company*, 109 U. S., 641, 6, 7, the second claim sued on was:

> "The combination and arrangement of the vault A, cask B, and suction pump C, substantially in the manner and for the purpose described."

In considering this claim, the court, through Justice Blatchford, said:

> "Without the valve *d* the peculiarly constructed cask of the patent could not be operated. So, as to claim 2, there could be no operative combination of vault, cask, and pump, unless the cask should have the valve *d*, and that valve was a part of the combination covered by claim 2."

It will be noticed that the "valve *d*" here construed into the second claim is in no way mentioned in it; in fact, it seems to have been left out intentionally, inasmuch as it was expressly made an element of the first claim. And yet this court construed it into the second claim, because "there could be no operative combination"

without it. Is not appellant's case much stronger as to his locking device?

Many other cases might be cited, but these are deemed sufficient to show the application of the rule in question—that the claim should be so construed as to make it cover an "operative combination." Under this rule, the locking device should be construed into the claim—if it is not already in it—because it is a necessity to the practical operation of the lifter. There would be no object in opening a transom if it could not be held open, or if there was no device "to lock it in that position." As to this, Mr. Bates says:

> "The transom-lifter would have no practical value without a lock applied to it. If you had to get up and stick a boot-jack in it, you might as well open it by hand at once. It is also important that the lock should be a part of the lifter and where it can be reached. . . . *The set-screw is necessary in all cases.*" (37, 45.)

Appellant says that the lifter would not be pratical or capable of use without the lock; that "the transom could not be held open or closed without some kind of locking device;" and that "it is certainly indispensable to a transom-lifter." (55.)

Referring to the prior art, Mr. Bates says that "a boot-jack or shingle were the only known forms of locking device for transom-lifters at that date." (38.) Mr. Wheelock says: "You all know how much trouble we had in climbing up on a stool and putting a broom-handle or something under the sash to hold it." (77.) And Mr. Horton says that he has "seen them use the boot-jack." (89.)

And the learned judge who presided in the court below himself says: "It is truly said that such a device, with-

out supports to support the rod or hold it away from the woodwork, and without a locking device, would be almost useless." (121.)

It is therefore respectfully insisted that, whether specifically mentioned or not, these special features—the middle support, the reversible bracket and the locking device—form parts or elements of the third claim. As already stated, we consider this construction to be required (1) by the language of the claim; (2) by its relation to other claims, particularly the first; (3) by the reissue proceedings in the Patent Office; (4) by this court's construction of the invention; and (5) by appellant's disclaimer.

The learned judge who presided in the Circuit Court, however, seemes to have misunderstood our argument in this respect, and to have treated it as an argument in favor of an enlarged construction. After referring to some or all the points above suggested, he says (121–22):

> "The adequate answer to these suggestions is that, although it may be true that Wollensak's actual invention included all the details of the device, except the rod and the lifting-arm, and was a substantially entire transom-lifter, yet that his reissued patent as it now exists not only does not make such a broad claim, but confines itself to the narrow limits which have been mentioned. The patentee declared that his invention consisted in providing the proper support and guide for the upper end of the lifting-rod. Upon that theory the invention was presented to the Patent Office, both in the application and upon the appeal. The obvious intent of the patentee and the language of the patent unite in the construction which has been heretofore uniformly given to it. The court cannot broaden the grant beyond the limitations which the patentee himself imposed. (*Railroad Co.* v. *Mellon*, 104 U. S., 112.) The effect of the construction which is asked for would be to graft upon the claim an invention not previously indicated

> upon its face' nor stated in the specification as one belonging to the patentee. (*Day* v. *Fair Haven Railway Co.*, 132 U. S.)"

As will be noticed, the court says that "it may be true that Wollensak's actual invention included all the details of the device" on which claim of novelty is now predicated; but, considering the claim to be confined within "narrow limits," he says that a construction which would make it cover these details would "broaden the grant," etc. In other words, he says, in substance, that a claim which includes the middle support, reversible bracket and locking device is broader than one not limited to these features! In effect, this is saying that a claim for the combination of a large number of parts or elements is broader than a claim for the combination of a small number of the same parts or elements!

The statements of the Circuit Court are also inconsistent or self-contradictory in other respects. After saying that, in his reissue, appellant did not make a "broad claim," but confined himself to "narrow limits," the court immediately adds that he declared his invention to consist in broad features—"the proper support and guide for the upper end of the lifting-rod"—and that it was upon this broad theory that "the invention was presented to the Patent Office, both in the application and upon the appeal." In a previous statement it was said that "when the patent was before the Patent Office, the guide above the junction of the operating-rod with the lifting-arm, and the prolongation of the rod beyond the junction, were represented as constituting the improvement." It is difficult to reconcile these statements—particularly about a broad invention and narrow claim—except upon the theory of confusion in the court's mind between the first and

third claims of the reissue. The first claim is broadly for "the proper support and guide for the upper end of the lifting-rod," and it was upon the theory that appellant was entitled to such a broad claim that "the invention was presented to the Patent Office, both in the application and upon the appeal;" and so, if the court had the first claim of the reissue in mind, his statements are not altogether unsupported or contrdiactory. But how does this affect the third claim, which was always in the original patent and which was not in any way changed by the reissue proceedings?

The statements that the reissue is confined to "narrow limits," and that "the obvious intent of the patentee and the language of the patent unite in the construction which has been heretofore uniformly given to it," are undoubtedly correct. But what is "the construction which has been heretofore uniformly given to it?" Aside from the learned judge's own decision, the only construction which has ever been given to the reissue is the one which this court put upon it when it said that "the claim must be regarded as a narrow one, and limited to the particular combination described." But, instead of being inconsistent with the theory that "all the details of the device" are included in the claim, it seems to us that the construction of this court supports such theory. These details clearly fall within the "narrow limits" marked out by the original specification, and not within the broad theory upon which, in the reissue proceeding, "the invention was presented to the Patent Office, both in the application and upon the appeal."

Accepting the construction of this court, that "the claim must be regarded as a narrow one, and limited to the particular combination described," appellant contends

that "all the details of the device" are features or elements of the claim in suit; but the court below says that this will operate "to broaden the grant." Either the court misunderstood our position, or we misunderstand his opinion, or his views are inconsistent with each other and with elementary principles or rules of construction. We, therefore, respectfully submit to this court whether its own construction, that "the claim must be regarded as a narrow one and limited to the particular combination described," makes it include "all the details of the device" or operates to "broaden the grant."

VII.

PRIOR PATENTS INTRODUCED.

As already stated, appellant's own patent acknowledges the device old in the art which most nearly approaches his invention; but, as showing the truthfulness of this statement, it will be necessary to consider prior patents introduced by appellee.

Appellee has introduced the Stickney & McGee patent of September 1, 1868, No. 81,703; the Stickney & McGee patent of December 22, 1868, No. 85,143; and the George W. Perry patent of April 30, 1872, No. 126,327; and Mr. Earle, its expert, says that he understands the device referred to in appellant's acknowledgment of the art "to be such as illustrated and described" in these patents. (102.)

If Mr. Earle is correct in this view, that these patents illustrate the old device referred to, then it seems clear that appellant made a long step in advance of everything shown or admitted as to the prior art. Each of these patents is lacking as to the following features or functions of appellant's invention: (1) his prolonged operating

rod; (2) his peculiar form of lifting-arm, having the part connected to the sash in the form of a reversible and outwardly and laterally projecting bracket; (3) his peculiar way of connecting the lifting-arm to the operating-rod by a coupling grasping the rod in its middle portion; (4) two of his guides, say the upper and middle ones; and (5) his peculiar form of locking device.

Although in the Stickney and McGee patents the rod is held out from the woodwork, it is not supported "at three points, to wit, above, below and at the joint where it sustains the weight of the transom." In each of these three patents, also, the device is applied to a car ventilator *pivoted in its center*, so that the rod is not required to perform the *lifting* functions called for by appellant's patent. In fact, the inference is irresistible that these patentees did not have in mind the lifting of a heavy weight by a light, slender rod. Nor is a set-screw employed for holding up the weight of the transom.

Appellee has also introduced the N. W. Speers shutter-worker patent of March 25, 1851, No. 7,998; the Bayley & McCluskey car ventilator patent of July 7, 1869, No. 79,541; and the F. E. Brown shutter-worker patent of August 10, 1869, No. 93,408.

Appellant has two answers to each of the patents: (1) that they really belong to a different art or class of inventions, and (2) that they fail to show appellant's peculiar construction.

Appellant's reissue being understood as calling for an "upright," "lifting" rod, "which sustains the weight of the transom," no matter how heavy or where hinged, it seems clear that shutter-worker and car ventilator patents really belong to another art or class of inventions. This view was clearly presented on the argument of the

appeal connected with the granting of this reissue, in considering the Bayley & McCluskey patent, now relied upon, as follows:

> "The applicant does not stand upon the ground of a mere improver upon devices previously employed for the same purpose, but he is the first man to produce the result by any means whatever. . . .
>
> "The reference cited by the Examiner . . . is not an improvement in transoms, and could not, without change, be applied to them. Even supposing the devices themselves to be the same, which I deny, their combination with a transom to produce a different result, or to cure a radical defect in its operation as a transom, is a new and patentable combination. It may be a combination of old devices, but that is as patentable as anything else under the law. The result produced is the evidence of invention, in such a case, and, as already stated and shown, the result produced with the transom is different from that in the reference. It is a difference in kind, and not a *mere* new occasion for the use of the mechanism. . . .
>
> "The reference would not work, even if the car itself were turned up. Place the slide-bars in the reference on the side of the car towards which the windows open, as is always done in transoms, and the whole device would be inoperative. The connecting links would then lock the bar instead of moving the window." (94, 95.)

In their final decision the Examiners-in-Chief fully sustained this view, in the following language:

> "We see nothing in the reference cited bearing on the matter herein claimed. Wollensak's device is, in the first place, a 'lifter' designed for raising against gravity a transom, hinged and swinging horizontally. The improvement covered by the claim consists simply in furnishing the vertical operating rod with a guide above the lever connection, as well as below, to prevent the rod from being bent and displaced and thus impaired for operating, as occurs with the old form.

> "Nothing of all this is found in the reference. There are no transoms, no lifters, no gravitating weight to be supported, and no tendency to bend the operating-rod by any incumbent weight; simply a series of windows, hinged in the French style, and arranged to be simultaneously opened and closed by a continuous rod or rods in guides, with lever connections to each window, so arranged that they could not afford support for the same, did their weight bear upon the rods. The one invention could never suggest or dominate the other, and if made by the same applicant, the Office would undoubtedly be swift to require division and separate patents for the same. To construe Bayley & McCluskey's patent as covering Wollensak's device now in dispute, would be to concede to them much broader claims than any set up by the latter. We must hold that the applicant is entitled to what he now claims." (96.)

All this was said with reference to the pertinency of the Bayley & McCluskey patent as against the broad claim which appellant was then insisting on—the first claim in the reissue; but certainly, if this patent was not then considered sufficient to meet such broad claim, it ought not now to be accepted as sufficient to meet the specific claim in suit.

It thus appears that the most respectable tribunal in the Patent Office—its Board of Appeals, consisting of three Examiners-in-Chief, required by law to be appointed in the same manner as United States Judges, and to "be persons of competent legal knowledge and scientific ability"—has, in effect, decided that the Bayley & McCluskey patent belongs to a different art or class of inventions.

A Patent Office decision of this character, in which the matter relied upon has been the immediate subject of litigation, greatly strengthens the presumption of novelty,

and is entitled to much weight in the consideration of a question of this kind. While on the Circuit, the late Justice Woods said in reference to the effect of such a decision, on the question of novelty, that while it "is not entitled upon this question to the force of *res adjudicata*, yet it is a determination entitled to the highest respect of the courts, and should not be reversed except upon the most satisfactory proof." *Cook* v. *Ernest*, 5 Fish., 406.

But, additional to all this, each of these patents, as to many material points, fail to show appellant's construction.

The Speers Patent.—The Speers patent does not have any "upright," "lifting" rod, or sliding rod of any kind; but a worm-screw is employed to open and close the shutter. It is also lacking appellant's supports and peculiar form of lifting-arm and locking device.

The Brown Patent.—The Brown patent has no "lifting" arm, no "upright," "lifting" rod, and no guide-supports to hold its horizontal rod out and distribute the strain, if there were any strain, to different points. Its rod simply passes through the wall of the building, and the apparent brackets in appellee's model are merely intended to represent the part of the wall through which it passes—otherwise the model is misleading. It has a locking device in the form of a set-screw, but this device is not required to hold up a heavy weight, and, therefore, does not perform the functions of appellant's lock. As Mr. Bates well says:

> "Its manner of use is different from that of a transom-lifter, and there is nothing in the Brown patent to suggest the construction set forth and claimed by Wollensak." (35.)

The Bayley & McCluskey Patent.—The Bayley & McCluskey slide-bar is not an "upright," "lifting" rod, "prolonged" for the purposes of appellant's rod—in fact, when considered with reference to each window separately, it is not prolonged at all. It is not "supported" out from the window; there is only one guide for each window, and if there were any strain, it is not and could not be distributed to different points. As in the case of the Speers and Brown shutters, its ventilator is opened outwardly—that is, away from the side at which the operating-rod is placed. It could not be opened inwardly or toward the side at which the rod is placed, for then the connecting links would operate to lock the bar instead of move the window. This was made very clear in appellant's brief before the Examiners-in-Chief, as follows:

> "Place the slide-bars in the reference on the side of the car towards which the windows open, as is always done in transoms, and the whole device would be inoperative. The connecting links would then lock the bar instead of moving the window." (95.)

Many and material changes would be necessary if it were attempted to apply the Bayley & McCluskey device to the purposes of the transom-lifter. As to this, Mr. Bates says:

> "The bracket extending outwardly and laterally would have to be added, and the sliding-bar would have to be moved away from the edge of the opening to leave space for the connecting link to operate. There is nothing in the Bayley & McCluskey patent to either suggest or warrant these changes. Another change which would have to be made would be to reduce the size of the bar to about one-sixteenth of its present weight, and to make it salable, it would have to be provided with supports to keep it away from the woodwork. These things are not suggested

> or warranted by the patent. The devices would have to be arranged vertically, instead of horizontally, and the lever I left off. As shown in the patent, the sliding-bars are moved by a lever or separate handle provided for that purpose. This would have to be removed, and the bar changed so as to be operated directly. None of these changes are suggested in the patent." (39.)

In another view, it is virtually admitted that the Bayley & McCluskey device does not embody or anticipate the construction called for by appellant's third claim. Mr. Earle, appellee's expert, says that—

> "If any application had been made embracing all the figures of the drawing of the patent in suit, and all the figures of the drawing of the Bayley & McCluskey patent, and the application had contained the two claims original of the Wollensak patent, together with the claim of the Bayley & McCluskey patent, *then a division would undoubtedly have been required, or should have been*, not because the application described both a car-ventilator and a transom-lifter, *but because of claiming two different inventions*, one of which was shown in one set of figures and the other in the other set." (114.)

In their opinion, the Examiners-in-Chief, speaking of appellant's invention and the Bayley & McCluskey patent, say:

> "The one invention could never suggest or dominate the other, and if made by the same applicant the Office would undoubtedly be swift to require division and separate patents for the same. To construe Bayley & McCluskey's patent as covering Wollensak's device now in dispute would be to concede to them much broader claims than any set up by the latter." (96.)

As to this, Mr. Bates says:

> "I agree perfectly with the Examiners-in-Chief. Their view would not be correct if the Bayley & Mc-

> Cluskey anticipated Wollensak, for if it did there could be no ground for a division. A division is required only where there are two distinct patentable inventions." (39.)

It thus appears that the Examiners-in-Chief, appellant's experts *and appellee's expert* all agree that if the two inventions had been presented and claimed in one application, in the way suggested, a division would have been required. Appellee's expert says that this would have been necessary "because of claiming *two different inventions;*" and in this way he agrees with appellant's expert that "a division is only required where there are two distinct patentable inventions." If the application had not shown "two different inventions," or "two distinct patentable inventions," there "could have been no ground for a division."

Mr. Earle also considers the matter in another light—as if both inventions had been presented in one application, one being treated "as a modification" of the other. Considering the question from this standpoint, he says:

> "If, in the application of Wollensak, all the figures of the drawing of the Bayley & McCluskey patent had been introduced as a modification of the Wollensak invention, illustrating the application of said invention to the operating of car ventilators, and the claim made in the identical words of the second claim of the original patent (the third claim of the reissue), then there would have been no ground for a division *and the claim would undoubtedly have been allowed as it was in the Wollensak application*, and for the reason that the Bayley & McCluskey illustrations would have clearly shown a fair modification of the invention shown in the principal figures illustrating the invention as applied to a transom." (114.)

Briefly, Mr. Earle says that if the two devices had been presented in one way "a division would undoubtedly have

been required, or should have been, . . . because of claiming two different inventions;" but that if they had been presented in another way they might both have been covered by a single patent, in which case the claim sued on "would undoubtedly have been allowed as it was in the Wollensak application." In either case, then, Mr. Earle says that if the two inventions had been made by one individual, and presented to the Patent Office in one application, the claim sued on "would undoubtedly" have been allowed. But if both the inventions were patentable to one individual, were they not also patentable to two?

VIII.

DATE OF WOLLENSAK INVENTION.

Another answer to all the patents introduced by appellee, except the Speers, is that they were not issued until after the date of appellant's inceptive invention, which was about 1866. (50, 59.) The evidence also shows reasonable diligence on the part of appellant in perfecting and adapting his invention and applying for his patent. Under these circumstances he is entitled to invoke the rule that a patentee, exercising due diligence, is entitled to protection back to the date of his inceptive invention.

Dixon v. *Moyer*, 4 Wash., 68; 1 Robb., 329.
Smith v. *Goodyear Company*, 93 U. S., 486.
Bates v. *Coe*, 98 U. S., 34.
Reeves v. *Keystone Bridge Co.*, 5 Fisher, 462.
Draper v. *Potomska Mills Co.*, 3 Banning & A., 215.
Consolidated B. M. Co. v. *Woerle*, 29 Fed. Rep., 449.

As appellant had conceived his invention previous to the issuance of various of appellee's patents, and was then

engaged in perfecting it, it is at least reasonable that, if possible, a construction should be adopted which will save his claim. In view of his position, the rule is applicable that if two inventors are prosecuting experiments at the same time, and each obtains a patent, the subsequent patent should, if possible, be so construed as to sustain it, if the principle on which it operates is different from that of the prior patent. This rule was thus stated and applied by Judge Brown, now Justice Brown, in *Moore* v. *Thomas*, 3 Banning & A., 13, 18:

> "In view of the fact that no suspicion of bad faith attaches to Jessup; that his invention was at once put into practical operation and the manufacture of machines commenced on a large scale, we think the court is bound to sustain his invention, if possible, particularly as the principle upon which it operates is quite different from that of the complainant's device."

Of course if appellant be protected back to the date of his inceptive invention, this ends the matter, so far as regards patents introduced; the Speers patent, the only one prior to the invention, does not contain the remotest suggestion of it. But if, in the application of a strict rule, appellant be held to the date of his patent, then we submit that, for the reasons already given, not one of appellee's prior patents can have the effect of anticipating his combination in suit.

IX

INVENTION REQUIRED IN MAKING LIFTER.

The changes made by appellant over everything that preceded him in the art were by no means small or unimportant, either in construction or as to results accomplished. If the old device referred to in his specification

be treated as an abandoned experiment—"inoperative, impracticable and worthless"—then appellant stands in the position of having made the entire lifter and every part thereof. But, whether this old device be so treated or not, it cannot be said that appellant received any help or encouragement from it; for, as Mr. Bates says, it "would rather discourage than encourage further efforts."

None of appellee's patent exhibits shows a light, slender rod, used to lift a heavy weight, or a set-screw used to hold up such weight. None of them shows "supports" for holding the rod out from the casing and for taking the strain at different points. Nor do any of them show appellant's peculiar form of lifting-arm, connected to the sash at one end by a reversible and outwardly and laterally extending bracket, and at the other end to the operating rod by a coupling grasping its middle portion.

In answer to a question as to "what difficulties" he had to contend with, and as to "how much time, effort and experimenting" he was required to expend in making the invention, appellant says:

> "It is difficult for me to state the time it took; as it occupied nearly all my spare time, and I am still learning that there are cases that require modifications to make the lifter adaptable to the various situations; required constant study, making models, patterns, throwing them away, and starting over again, and I have not got through yet." (53.)

In his following answers, from which quotation has already been made, he says:

> "The difficulties that I ran against in making my first models, in experimenting, were in providing against the transom that was heavy, in lifting it, and arranging the rod so as to be held out from the woodwork, and so as to make proper connection with the transom. All these things had to be studied,

> which took time and experimenting. . . . I had no basis to start out with. I had everything to learn. I hardly know myself how I finally got it into a perfect state. It came by degrees." (53, 54.)

He also explains various experiments and changes which he made in reference to the locking device (54, 57); and all his statements, in reference to "the difficulties that he ran against" in making the invention, are fully corroborated by the patents subsequently taken out by him and others.

After fully considering everything in the record, Mr. Bates says:

> "There was invention involved. The invention in question relates to an entirely new subject, one concerning which a great many patents have since been granted, but concerning which nothing practical was previously done. The failure referred to in the specification, in speaking of some prior device, would rather discourage than encourage further efforts. Many of the parts or elements shown and described in the reissue are entirely new. Those which are not entirely new are of different form from anything shown in the prior art and are differently used. While the reissue, speaking of some previous abandoned experiment, may appear to say that the only thing added is the upper guide, the invention was really much more than this, and the reissue specification simply emphasizes this point. Though the device seems simple enough at this date, over sixteen years after it originated, when the art has been fully developed by subsequent efforts and study, it must certainly at that time have required considerable study, thought and experiment, after the conception of the idea, to put the device in a shape in which it woud be practically operative, and also a successful article of builders' hardware. It therefore must have required more than mere mechanical skill to produce it." (39–40.)

If there is one thing fully shown in this record, it is

the fact that appellant introduced the transom-lifter to the public, put it on the market, and made the transom the useful, easy and elegant means of ventilation that it now is. To him, as inventor and manufacturer, belongs the real merit of introducing the lifter and popularizing the transom. Seventeen leading architects, hardware merchants, and master builders, testify to this fact, but not one witness testifies to the contrary. The experience of some of these parties extends over thirty-five years, and their familiarity with the art, the appliances used, and the existence of the want, has been acquired in various cities. Some of them say that appellant's invention has made the transom. The architects say they have included it in their specifications for buildings from the time of its introduction, and that they could not dispense with it; the merchants say that there is a large demand for the patented lifters, and that they constantly receive orders for them. That we are not ascribing an undue merit to appellant will appear from a reference to the evidence, as follows:

Mr. Randolph, for twenty years an architect, says that appellant's lifter is an article of great merit, that he does not see how his profession could get along without it, and that he never previously saw any lifter, except the cord and pulley—no lock and lifter combined. (64)

Mr. Addison, for eight years an architect, says that he thinks it very valuable, and very ornamental, and that it has made the transom; that the transom was "no good" without it. (66.)

Mr. Jenney, for twenty-four years an architect, says that it is valuable, that he has used it in every building he has constructed since it was introduced to him, and that it filled a recognized want in the art. (69.)

Mr. Jennison, for twelve years an architect, says that

he knew of nothing but a cord and pulley before appellant's lifter; and that, as far as he knows, it was the first transom-lifter ever introduced to the public. (73.)

Mr. Sherman, for twenty-eight years a master builder, says he thinks appellant's lifter of "great value," that he never knew of anything of the kind before it, that he has used it extensively, and that it has come to be regarded as a special article of hardware merchandise. (73–74.)

Mr. Wadskier, for thirty years an architect, says that prior to appellant's invention he "never saw any means except getting up on a chair and putting a block of wood in the transom, or something of that kind—a stick of wood or something." (76.)

Mr. Wheelock, for thirty-five years an architect, says: "I think it possesses a very great value; it is particularly useful, and it is the most useful thing of the kind I have ever seen anywhere. You all know how much trouble we had in climbing up on a stool, and putting a broom handle or something under the sash to hold it." He also says that it filled a "very great" want in the business. (76–77.)

Mr. North, for twenty-two years a hardware merchant, in speaking of what had been used prior to the invention, says: "I do not remember anything except a combination of cords and pulleys, or something of that kind; there was nothing specifically made for that purpose;" and that the lifter has become a standard article in the trade. (78.)

Mr. Hunt, hardware merchant, in speaking of the patented lifter, says that it has become a recognized article in the trade, and that he regards appellant as the creator of the trade in transom-lifters. (83.)

Mr. Bliss, hardware merchant, speaking of what existed before, says: "We had to use cords and pulleys, except what was known as the sky-light lifter"—which he says

could not be used for a transom; that he regards complainant as the creator of the trade, and that the lifter has become a standard article. (84.)

Mr. Pennington, for thirty years a master builder, says, in reference to what existed before: "I never saw anything but pulleys and cords, and I have never heard of anything." (88.)

Mr. Horton, hardware merchant, says: "I never saw anything especially for that purpose; we used cords and other methods of keeping the windows closed. I have seen them use the boot-jack." (89.)

The testimony of other witnesses is to the same effect, namely, that there was no transom-lifter in the market, or known to builders, architects or merchants, prior to appellant's invention, and that upon his introduction of it, it at once went into general use, supplied a great want, became a specialty in the trade, and has since continually grown in favor.

The testimony of appellant also shows, in a striking manner, the efforts he made to introduce the patented lifter, the favor with which it was received by the public, and the exclusive use into which it has gone. He says:

> "I introduced them by sending out circulars and models, and by advertising them in the trade papers, newspapers, and by pamphlets, books, and so on. I sent men out on the road to introduce them. I put out a great many models, and consigned them to cities, and did everything else that suggested itself, with a view of introducing the goods and putting them on the market. I presume that I sent out as many as five hundred models; that does not include the actual lifters that I sent out as samples, which were sent out gratuitously. I spent a great deal of money in advertising; in some instances I paid as high as $300 for a single insertion in a catalogue. I do not know how much I spent, but it reaches far into the thousands of dollars. The goods are known

> all over this country and Canada, as well as foreign countries, to-day. The models ranged in price all the way from $3 up to $65 each. I have established agencies in all the principal points in the United States, and they are now carrying a stock of my transom-lifters. I have agents at New York, Philadelphia and St. Louis, besides headquarters in other large cities. By headquarters, I mean one house in each of these large cities that carry a stock of transom-lifters, and who get a special price, the object being to make it an object, or inducement, for them to introduce the goods and push them." (49.)

He also says that he has a trade in foreign countries in his patented lifters; that some of them have "been shipped to Australia, London, China and the Hawaiian Islands." (49.)

The invention was so new, in fact, that, after bringing it into existence, appellant was also required to find a name for it. As to this, he says:

> "I not alone was the first to introduce a transom-lifter, but originated the name 'transom-lifter' as well. Such a name as 'transom-lifter' was unknown prior to the time that I first introduced my transom-lifters. I introduced the name to the public by illustrations of the transom-lifter, and directions how to put it up, and explanations explaining what a transom-lifter was." (58.)

Without further comment, we submit that this evidence of introduction, and of great utility, popularity, and extensive use among architects and builders, fully answers appellee s objection that the patented lifter required no invention, but only mechanical skill, for its production. If there were any room to doubt the exercise of the inventive faculty, which we deny, these facts certainly bring the case within the rule that utility and extensive use are sufficient to turn the scale in favor of the patent, in all doubtful cases. Taking the case most strongly against

appellant, the language of Justice Brown, speaking for this court in *The Barbed Wire Patent*, 143 U. S., 275, 282–3, is especially applicable:

> "It is true that the affixing of barbs to a fence wire does not apparently give a wide scope to the ingenuity of the inventor. . . . The difference between the Kelly fence and the Glidden fence is not a radical one, but slight as it may seem to be, it was apparently this which made the barbed wire fence a practical and commercial success. The inventions of Hunt and Smith appear to be scarcely more than tentative, and never to have gone into general use. . . . Under such circumstances, courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents, it is the last step that wins. It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond-shaped prong, but evidently it did not; and to the man to whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp."

As illustrating the application of this general rule, that "in the law of patents, it is the last step that wins," see, also:

Smith v. *Goodyear D. V. Co.*, 93 U. S., 495.
Loom Co. v. *Higgins*, 105 U. S., 591.
Magowan v. *N. Y. Belting Co.*, 141 U. S., 332.
Gandy v. *Main Belting Co.*, 143 U. S., 587, 594.
Topliff v. *Topliff*, 145 U. S., 156, 163.
U. S. Stamping Co. v. *King*, 7 Fed. Rep., 867.

> all over this country and Canada, as well as foreign countries, to-day. The models ranged in price all the way from $3 up to $65 each. I have established agencies in all the principal points in the United States, and they are now carrying a stock of my transom-lifters. I have agents at New York, Philadelphia and St. Louis, besides headquarters in other large cities. By headquarters, I mean one house in each of these large cities that carry a stock of transom-lifters, and who get a special price, the object being to make it an object, or inducement, for them to introduce the goods and push them." (49.)

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U. S. Stamping Co. v. *King*, 7 Fed. Rep., 867.

Consolidated B. S. Co. v. *Detroit S. & S. Co.*, 47 Fed. Rep., 894.
Watson v. *Stevens*, 51 Fed. Rep., 757, 761.

In considering the question of novelty or patentability, it should also be remembered that patents "are to receive a liberal construction, and under the fair application of the rule, *ut res magis valeat quam pereat*, are, if practicable, to be so interpreted as to uphold and not to destroy the right of the inventor." (*Turrill* v. *R. R. Co.*, 1 Wall., 491, 510.) And, as was said many years ago, "it is not to be expected, in this era of the mechanical arts, that a machine original in all the instrumentalities it employs can be produced" (*Carr* v. *Rice*, 1 Fisher, 198, 204); and, therefore, "whenever a change or device is new, and accomplishes beneficial results, courts look with favor upon it. The law, in such cases, has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device." *Middletown Tool Co.* v. *Judd*, 3 Fisher, 141, 146.

X.

RELATIVE POSITION OF PARTIES.

Appellant's right to the particular form of transom-lifter in question has been almost universally acquiesced in ever since the granting of his original patent; and, by selling and advertising his transom-lifters for many years, appellee itself* has joined in this recognition of the appellant's rights.

Its advertising of appellant's transom-lifters was also under circumstances which have a peculiar significance.

*This may be slightly incorrect if appellee and its New York house are not to be treated as substantially one concern; but appellant considers that they should be so treated.

The first of these advertisements was solicited by it and inserted in its catalogue about the time it began to manufacture the Reiher lifter, and the second, after it had been manufacturing such lifter about three or four years. In its letters to appellant soliciting these advertisements, it refers, in a very natural way, to "*your* patent transom-lifters" (98) and to "*your* transom-lifter and lock." (99.) If it be said that this is a little matter, we answer that, as straws show the direction of the wind more satisfactorily than heavier things, so little, unstudied expressions often show a man's real views more satisfactorily than his deliberate or carefully weighed words.

But passing this, what is appellee's position with reference to this advertising? At its own solicitation it has been paid $500 for advertising appellant's goods, these advertisements, according to its own statements, covering a period of six years, but in reality more. Now that the goods have been well advertised and the business made profitable, appellee, changing front, seeks to take away the trade in part built up and popularized by the very advertising for which it has been paid. In this respect appellee is believed to occupy a position without precedent:—it has been paid for advertising appellant's goods, but now insists on having the trade built up by such advertising; or, in other words, it has sold the seed and been paid for sowing them, but now insists on reaping the harvest grown from them. Will a court of equity countenance such conduct?

But there is another point to be considered in determining appellee's position with reference to these advertisements. They were inserted in catalogues bearing the name "Sargent & Co." in three places on the outside and many places inside, and having a title-page reading: "Price List and Illustrated Catalogue of Hardware man-

ufactured and for sale by Sargent & Co., New York and New Haven, Conn., U. S. A." The goods are referred to as "J. F. Wollensak's Patent Transom-Lifter and Lock," but in no way is appellant's address or place of business given, not even by a reference to the city in which he lives; nor is he in any way referred to as manufacturer of the goods. In fact, the advertisements contain no reference to him whatever, except in the use of his name in designating the goods, which were already thus generally known in the trade. There being, then, no reference to appellant which could possibly induce the sending of orders to him, but the goods being advertised along with other articles manufactured or "for sale by Sargent & Co., New York and New Haven, Conn.," the natural and necessary result would be that all orders induced by the advertisements would go directly to appellee at one of its two places of business.

This is no doubt exactly what the parties intended; appellant desired to manufacture the goods, appellee to sell them. But does not this very fact raise an implied agreement on the part of appellee that it would not seek to undermine appellant's business by drawing away his customers, or otherwise make an unconscionable use of the advantages given it? If not, then appellant may be in a most serious position; for many years appellee has been advertising in such a way as to draw the trade to itself, and now that it has got control of customers all over the country, it seeks to get rid of its obligation to recognize appellant's patent. Will a court of equity countenance such conduct? And especially will a court of equity permit appellee to thus destroy appellant's business by reason of the very advertising it has been paid for, and after both parties have for many years acted on

an implied understanding or agreement that one should manufacture the goods and the other sell them?

In *Pentlarge* v. *Beeston*, 3 Banning & A., 144, Judge Benedict refers to the fact that, while in partnership, the parties to that suit advertisee their goods "to the public as secured by patent," and says:

> "This was a representation by the defendants that the bungs were protected by the plaintiff's patent, that being the only patent ever issued for this invention; and during this period there was an acquiescence by the public in the claim thus made. Nor does it now appear that any persons besides the defendants, one of whom is the son, and both the former partners of the plaintiff, claim the right to use this invention. Furthermore, since the dissolution of the partnership and up to this time, the defendants, although well aware that the only patent in existence is that of the plaintiff, are making and selling these bungs as patented articles, and, by their advertisements, now represent to the public that the bungs they are making are secured by a patent. These acts and declarations of the defendants are adverse to the ground they take in the defense of this action," etc.

This is exactly the position of the parties to this cause, except that here the facts are even stronger against appellee. In the Pentlarge case the conclusion that the goods were advertised as made under the plaintiff's patent was reached by inference, "that being the only patent ever issued for the invention;" but here no such circuitous reasoning is required, the goods having been expressly advertised as "J. F. Wollensak's Patent Transom-Lifter and Lock."

As already stated, the advertisements in question were for the mutual benefit of the parties, and were especially intended to increase appellee's sales of the patented lifters manufactured by appellant. Having succeeded in

getting a large line of customers through many years' advertising, for which it has been paid by appellant, and which at every sight or reading impressed upon the public the fact that the goods were secured by appellant's patent, appellee now attempts to say that they are not so secured—that it was all the time imposing upon the public by its advertisements, and that every time it received an order induced by them it was obtaining money or business under false pretenses. How far will a court of equity permit a party thus to seek and obtain business on distinct representations that his goods are covered by a patent, and then, after he has got this fact well impressed upon the public, so as to deter others from competitive manufacturing, turn around and say that they are not covered by any such patent, and that all his statements to that effect were false?

In striking contrast to all this is the position occupied by appellant. Before he entered this field of invention there was no such thing as a transom-lifter, or device for opening, closing and locking transoms, sold or known in the market. Striking out in an entirely new field, he created the trade in this specialty in hardware, and, through most persistent efforts and liberal expenditures of money, introduced the transom-lifter into general public use; and, devoting himself to this one thing for twenty years or more, he has succeeded in building up a large and profitable business. Not only have his efforts proved successful in a business view, but important and lasting benefits have been conferred on the public by his inventions; the transom-lifter is an all-important aid in ventilation, and hence intimately related to the subjects of health and home life. Is not the man who has thus created and built up a large business, beneficial alike to the

public and himself, entitled to more favorable consideration in a court of equity than one who seeks to reap where he has not sowed, or rather to reap from another's seed which he has been paid for sowing?

XI.

REISSUE NO. 10,264.

This reissue was before this court in *Wollensak* v. *Reiher*, 115 U. S., 96, and the court then held that, in the absence of an explanation of delay, the reissue must be considered as invalid, because on its face it did not appear to have been applied for in apt time. The present bill explains the delay at length (10–12), the opening part of its explanation being that—

> "Said reissued letters patent were applied for in good faith and not for any fraudulent or improper purpose; that, as your orator verily believes, no other person, firm or corporation not acting under his authority ever began the manufacture, sale or use of transom-lifters containing or embodying said inventions or improvements until long after your orator had consulted counsel and taken steps toward applying for said reissue, and until long after your orator had applied for and obtained a reissue of his previous patent on transom-lifters, having broader claims than any now contained in said reissue No. 10,264."

The bill then proceeds to explain that appellant's solicitors were instructed to apply for the reissue sometime prior to April 9, 1878, but that, owing to various circumstances, particularly the advice of counsel and death of the one having the matter in charge, the application was delayed three or four years; after which appears this statement:

> "That the delay in applying for a reissue of said patent after your orator became aware of the defect

in the original patent, No. 148,538, was caused by the advice and matters aforesaid, and that the delay that occurred before that time was due to the fact that your orator was young and inexperienced in such matters, never before having had occasion to to take out a reissue patent, or otherwise become familiar with the law in relation to reissues, and to the further fact that your orator was then struggling to build up his business and unable to incur or assume any more expense in the obtaining of patents than was considered actually necessary for the protection of his business."

Following this is a statement to the effect that a full explanation of the delay was presented to the Patent Office as a part of the reissue application, which statement was at first considered to be insufficient in view of *Miller* v. *Brass Co.*, but which on appeal was held to sufficiently and satisfactorily explain the delay, the Examiners-in-Chief saying:

> "We do not find any evidence of such laches or delay after ascertaining the defects of his patent as to debar or estop him from the benefits of the statute."

The truthfulness of these statements or allegations are of course admitted by appellee's demurrer; but some of them, especially as to appellant's position in early days, are shown by his testimony in reference to the other reissue, as follows (52, 53):

> "I have stated that my partner, at the time of making this model, was not a suitable man to continue with, and I believed that if I applied for a patent at that time he would, by the terms of our agreement, become part owner. After we dissolved, which was in the spring of 1869, I was short of funds, on account of having to buy him out, and not long after that the fire came along and burned up everything I had. After the fire I took another partner, and soon learned that he was not a suitable man for me, and for these reasons did not deem it wise to

apply for a patent earlier. But immediately, almost, on the dissolution of my second partnership I made preparations to and did apply for a patent.

"At the time of our purchase from my father, we were doing small business in repairing and key-fitting, and our income was, of course, in proportion. I did not have the heart myself to push very rapidly, in view of the decrease of the trade, for the reasons I have stated, on account of the incompetency of my (acting) partner, so we dragged along very slowly, and it was nip and tuck to pay the bills, especially on my part, to pay father my half portion. After the dissolution with Salzer, the business was in a very little better condition than when we took it, and I saw that some necessary improvements had to be made, and I made them. This involved considerable outlay, and that, together with what I had to pay Salzer for his interest, left me short of funds always up to the time of the fire. I was just then about getting through with the improvements when the fire came along. After the fire I was very short of funds and I took in a partner again who had some money, and continued with him about two years, but we could not agree, and it was not until I dissolved with him that I felt able to and willing to go on and manufacture this device. . . .

"The difficulties were that I was lacking of funds, for one. I commenced business when I was quite young; not having any money, I borrowed what I did have to invest in the business; and I had two partners prior to that time that I could not agree with, and held back applying for a patent on account of that."

All these facts being admitted or undisputed, the only question is in regard to their sufficiency. In considering this question, we respectfully submit that "the court should proceed in a liberal spirit, so as to sustain the patent," if possible (*Klein* v. *Russell*, 19 Wall, 433, 466,); and, proceeding in this spirit, the court should seek to protect a meritorious inventor, who, in developing and

introducing his invention, had to contend with and overcome serious financial embarrassments and other difficulties incident to a new and struggling business. And especially should doubts be resolved in appellant's favor in view of the fact that the reissue was applied for in good faith and *before adverse rights accrued*—which makes the case very different from one in which a reissue is obtained for the purpose of covering or repressing the inventions or manufacture of others.

The evils of the old practice having been fully corrected, there is now no object to be gained by pushing the rule of *Miller* v. *Brass Company* to extremes—by applying it without regard to the special facts of each case. Instead of doing this, it seems to us that the court should hesitate to apply it against meritorious inventors in cases not involving adverse rights of the public previously acquired. To sustain the present reissue will simply protect appellant in his own invention, made and introduced under trying circumstances, and this without in any way defeating the object or violating the spirit of the rule in question, which was simply intended to protect the public against abuses of a kind entirely foreign to everything connected with appellant's conduct and to every fact or circumstance of his case.

XII.

GENERAL SUGGESTIONS.

In conclusion, we may be permitted to suggest that appellant's inventions are of a kind which our patent laws are especially designed to encourage and protect. The interest of manufacturers to increase efficiency, lessen expense of manufacture, etc., may of itself often be suffi-

cient to encourage the making and development of large or important inventions. In such cases, as the inventions would come into existence from other causes, the question of patent protection may be a very insignificant or unimportant one. But this does not apply to inventions of the kind here in question, from which, if thrown open to the public, no one derives any special advantage. As to such inventions, there is generally no business object of the kind mentioned sufficient to encourage their development or manufacture, and for this reason it is necessary to stimulate interest by the hope or assurance of an exclusive right for a limited time. In this view, it seems to us that if there is one class of inventions entitled to more favorable consideration than another—which falls more clearly within the spirit of our patent system than another—it is the class of small devices or contrivances, which are of little or no value to any one if thrown open to the public, and which therefore need the special stimulus and encouragement of patent protection.

In another view, both appellant's position and the character of his inventions present an unusually strong appeal for the exercise of a broad liberality. In other countries, as, for instance, in England, the man who first introduces an invention is rewarded by a patent. With us, this is not enough, for here the patentee must be the actual inventor; but we greatly mistake the genius of our institutions and the spirit of our patent system, if no consideration can be given to the fact that, in addition to being an inventor, a patentee is also the father and founder of an important industry. If there was nothing else in the case, it would still seem reasonable that all doubts should be resolved in favor of one thus standing in the position of father to the trade, rather than in favor of one who has long recognized this fact, but who, not to

speak more harshly, now seeks to reap where it has not sowed, or rather to reap the harvest grown from seed which it has been paid for sowing.

But, as already suggested, another very important reason why all doubts should be resolved in appellant's favor is, that his inventions have a very close relation to our health and homes. Many inventions are of such a character that, in a measure, their arm of influence extends to or encircles all our business interests. Others are labor-saving and calculated to lighten the burdens of the toiling masses; and others still add to our convenience and comfort in the ordinary work and pleasures of life. But is there any invention more important, or which appeals more strongly to the favorable consideration of a court of equity, than some of the apparently little, simple devices or contrivances calculated to give comfort to our homes or health to ourselves and families? In this day of high pressure, when everything is rushed along at railroad speed, and when too often the limit of human life is short because of this, there is a class of inventions more to be desired, and more deserving of encouragement, than those which simply enable the fire of life to burn fiercely in order that it may the sooner go out.

Not the least important of this class are inventions, such as the one here in controversy, that are calculated to add to the health or strength of our minds and bodies and to the convenience and comfort of our home life. If there be any doubts in the case, should they not be resolved in favor of the man who has spent many years of time and many thousands of money in bringing an invention of this kind into existence and public use? In harmony with the spirit of our patent laws and with what seems to us to be the highest sense and reason, should

not the court hold out encouragement to others interested in the development of health-giving inventions?

In view of all the foregoing, we respectfully submit that the decree of the Circuit Court should be reversed and the cause remanded, and ask a decision accordingly.

EPHRAIM BANNING,
THOMAS A. BANNING,
Counsel for Appellant.

Chicago, November, 1893.

151US221

RECORD, CASE No. 14,103.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 150.

JOHN F. WOLLENSAK, APPELLANT,

vs.

SARGENT & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED AUGUST 18, 1890.

PRINTED, WAS

RECORD, CASE No. 14,103.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO, 150.

JOHN F. WOLLENSAK, APPELLANT,

vs.

SARGENT & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

INDEX.

	Original	Print
Bond on appeal	1	1
Return of the circuit court	2	1
Bill of complaint, No. 585	3	1
Reissue letters patent No. 9307, granted John F. Wollensak July 20, 1880	11	7
Subpœna	12	8
Bill of complaint, No. 586	12½	9
Reissue letters patent No. 10264, granted John F. Wollensak December 26, 1882	23*a*	15
Subpœna	24	19
Appearance	26	20
Hearing on motion for temporary injunction	26	20
Opinion on motion for temporary injunction	27	20
Answer	36	26
Replication	39	27
Defendant's demurrer to bill, No. 586	40	28
Stipulation as to case No. 586	41	28
Stipulation and appointment of special examiner	43	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 4, 1893.

	Original.	Print.
Complainant's evidence	44	29
Stipulation as to evidence	44	29
Deposition of William S. Bates	45	30
Complainant's evidence in rebuttal	47	31
Deposition of William S. Bates	47	32
John F. Wollensak	74	48
William J. Wilkes	94	61
Stipulation as to evidence	97	62
Deposition of Smith M. Randolph	98	63
John Addison	101	65
John Middleton	104	67
W. L. B. Jenney	106	68
E. S. Jennison	112	72
John J. Sherman	113	73
Matthew B. Sweezey	115	74
Theodore B. Wadskier	117	75
Otis L. Wheelock	118	76
R. L. North	120	77
Oswald Locket	122	79
Frederick Bauman	125	81
Lucas Hunt	128	82
George E. Bliss	130	84
G. S. Standart	132	85
B. F. Homer	134	86
Richard Pennington	135	87
James M. Horton	137	88
Amos Grannis	139	89
File-wrapper and contents, Wollensak appeal	141	90
Statement of the case and points relied upon in support of appeal	142	91
Examiner's answer to reasons of appeal	144	92
Brief of applicant	146	94
Claims of transom lifter and lock in dispute	149	95
Notice of reversal of examiner's decision	150	96
Disclaimer	151	97
Complainant's Exhibit Sargent Letter No. 1—Letter, Sargent & Co. to Wollensak, April 17, 1880	153	98
Complainant's Exhibit Sargent Letter No. 2—Same to same, April 26, 1880	153	98
Complainant's Exhibit Sargent Letter No. 3—Same to same, April 19, 1884	154	98
Certificate of special examiner	155	99
Defendant's evidence	156	100
Deposition of John E. Earle	157	100
Defendant's evidence in rebuttal	193	117
Deposition of Henry B. Sargent	194	117
Certificate of special examiner	199	119
Hearing	199	120
Opinion	200	120
Order of consolidation	206	123
Decree	206	123
Allowance of appeal	207	124
Clerk's certificate	208	125

1 Circuit Court of the United States, District of Connecticut.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY. } In Equity. Nos. 585 and 586 Consolidated.

Know all men by these presents that we, John F. Wollensak and Ephraim Banning, both of Chicago, Illinois, are held and bound unto Sargent & Company, of New Haven, Connecticut, the above-named defendant, in the penal sum of five hundred dollars ($500), lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas on the 28th day of February, A. D. 1890, a final decree was entered in the above-entitled cause (consolidated) dismissing the bill of complaint therein and against the said John F. Wollensak for costs, from which decree the said John F. Wollensak has taken an appeal to the Supreme Court of the United States:

Now, therefore, if the said John F. Wollensak shall duly prosecute his said appeal with effect or shall pay all damages and costs that may be awarded against him in case the said decree shall be affirmed in said Supreme Court, then the above obligation shall be void; otherwise the same is to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 28th day of February, A. D. 1890.

JOHN F. WOLLENSAK. [SEAL.]
EPHRAIM BANNING. [SEAL.]

Approved as to form and sufficiency of security.

JOHN K. BEACH,
Def't's Sol.

2 HARTFORD, *March* 21, 1890.

The foregoing bond is approved and the appeal allowed.

N. SHIPMAN,
District Judge.

The Return of the Judges of the Circuit Court of the United States for the District of Connecticut to the Foregoing Appeal.

The bill, answer, and pleadings, evidence, and proceedings whereof mention is therein made follow in these words, viz:

3 JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY. } No. 585. In Equity.

Be it remembered that on the 29th day of December, 1887, there was filed in court a bill in equity, which is in the words and figures following, viz:

Circuit Court of the United States, District of Connecticut.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY. } In Equity. Reissue No. 9307.

Bill.

To the honorable the judges of the circuit court of the United States for the district of Connecticut:

John F. Wollensak, of the city of Chicago, in the State of Illinois, and a citizen of the State of Illinois, complainant, brings this his bill against Sargent & Company, of the city of New Haven, in the State of Connecticut, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, defendant; and thereupon your orator complains and says:

1. That prior to the 11th day of March, A. D. 1873, your orator was the original and first inventor and discoverer of a new and useful improvement in transom-lifters, not known or used by others before his invention thereof, and which had not, at the time of his application for a patent therefor, been in public use or on sale in this country for more than two years, as your orator verily believes; and that, upon application therefor, letters patent of the United
4 States, No. 136,801, were issued to your orator, dated the said 11th day of March, 1873, granting to him, his heirs or assigns, for the term of seventeen years, the sole and exclusive right and privilege of making, using, and vending to others to be used, the said invention—as by reference to said letters patent, here in court to be produced if required, will more fully appear.

2. That said letters patent, being afterwards considered to be inoperative or invalid by reason of an insufficient or defective specification, which insufficiency or defect resulted through inadvertence, accident or mistake, and without any fraudulent or deceptive intent on the part of your orator, were afterwards surrendered and duly cancelled by the Commissioner of Patents; that thereupon, and upon due application therefor, reissued letters patent of the United States, No. 9307, were issued to your orator, dated the 20th day of July, 1880, granting to him, his heirs or assigns, for the term of seventeen years from the said 11th day of March, 1873, the full and exclusive right and privilege of making, using, and vending to others to be used, the said invention—as by reference to said reissued letters patent, here in court to be produced, and a copy of the specification and drawings of which is hereto attached, will more fully appear; that your orator is, and ever since the granting thereof has been, the sole owner of said reissued letters patent; that said reissued letters patent were applied for within what your orator believed to be a reasonable time, and in good faith, and not for any fraudulent or improper purpose, but that the first claim thereof, as the same was granted and issued, was afterwards considered to be too broad, and therefore invalid; that thereupon your orator afterwards disclaimed said first claim, pursuant to the statute in such case made and provided; that the other claims now remaining in said

reissued letters patent are substantially the same as, or repetitions of, the claims of said original patent, and therefore, as your
5 orator is advised, not open to objection because of any proceeding, matter or thing connected with the surrender of said original and the granting of said reissued letters patent; and, generally, that your orator believes said reissued letters patent to be in all respects good and valid in law.

3. That your orator is, and for many years past has been, engaged in the manufacture of transom-lifters of the kind described and claimed in said reissued letters patent; that, so far as he knows or has any reason to believe, your orator was the first to ever engage in the manufacture of transom-lifters as a specialty in builders' hardware, and the first to ever put the same on the market as an article of hardware, or to introduce the same into general and public use; that your orator has invested and expended large sums of money and been to great pains and trouble in introducing his said patented transom-lifters to the public; that he now has a large amount of money, to wit, over twenty-five thousand dollars ($25,000), invested in the business of manufacturing and selling transom-lifters alone, the greater part of his business in this respect being in the manufacture and sale of transom-lifters of the kind described and claimed in said reissued letters patent; that for the last sixteen years, or about that period, he has devoted almost his entire time to the perfecting and introduction of transom-lifters, and, through his efforts and liberal expenditures of money, has succeeded in building up a large and profitable trade therein all over the United States and in foreign countries; that he has created and built up such trade through his own efforts, there being no such thing as a transom-lifter, or any kind of a device for opening transoms, known in the trade or sold in the market before his invention and introduction thereof; that he is now, and for about sixteen years last past has been, able and willing to meet and supply all the demands of the public therefor; that the public has derived great benefits from his said invention; and that, if protected in
6 the enjoyment of his exclusive rights, secured to him by said reissued letters patent, and various other letters patent issued to him for other improvements in the same line, your orator believes he will hereafter continue to realize large gains and profits from the manufacture and sale of such transom-lifters.

4. That on or about the 11th day of December, 1886, your orator filed his bill of complaint in the circuit court of the United States for the northern district of Illinois, against one Frank A. Reiher, charging him with an infringement of the third claim of said reissued letters patent, and praying an injunction and account against him; that afterwards, to wit, on the 16th day of February, 1887, the defendant filed a demurrer to said bill, which demurrer, with a motion for a preliminary injunction, was heard by his honor, Judge Henry W. Blodgett, on the 3rd day of June, 1887; that, as your orator is informed and believes, although the counsel for said defendant was not present at said hearing, said judge himself specially spoke of and considered the question of invention and the meaning

or effect of the language of the Supreme Court contained on page 94, 115 U. S.; that, after thus giving special consideration to these questions, said judge overruled said demurrer, and ordered a preliminary injunction to issue, pursuant to the prayer of said bill, upon your orator's giving bond in the sum of one thousand dollars; that afterwards, to wit, on the 5th day of July, 1887, the said defendant having failed to file an answer or make any further defense, an interlocutory decree was entered in said cause, ordering a perpetual injunction, pursuant to the prayer of said bill, and referring said cause to a master to take an account of profits and damages, on which reference it is still pending; and that,—excepting the said Frank A. Reiber, against whom your orator has obtained an injunction as aforesaid, and a company which
7 infringed for a short time, and discontinued infringement after its attention was called to said reissued letters patent, as your orator is informed and believes—the public generally have, for a period of more than fourteen years, acknowledged and acquiesced in the validity of said original and reissued letters patent, and, so far as your orator knows, no other person, firm or corporation has ever heretofore disputed the validity thereof, or in any way before the infringement hereinafter complained of, attempted to enter upon the manufacture and sale of transom-lifters of the kind described and claimed therein.

5. That since the granting of said reissued letters patent, and at divers times and occasions prior to the filing of this your orator's bill, the said defendant, Sargent & Company, well knowing the premises, and in infringement of the third claim of said reissued letters patent, and in violation of the exclusive rights of your orator thereunder, and without the license of your orator, at New Haven, to wit, at the district aforesaid, has made and sold, and still continues to make and sell, transom-lifters embodying and containing said inventions and improvements described in said reissued letters patent No. 9307, and particularly specified and claimed in the third claim thereof; that for many years the said defendant has been handling such transom-lifters of your orator's manufacture, and in this way it has become familiar therewith, and with the demands of the market therefor; that, having thus become familiar with said business, and with the trade established and built up by your orator at great labor and expense, as aforesaid, the said defendant has recently entered upon the manufacture and sale of said infringing transom-lifters; that said defendant has been notified of its said infringement and requested to desist therefrom, but that it refuses so to do; that great and irreparable damage and injury have resulted to your orator by reason of said infringement, and great gains and profits have accrued to the said defendant there-
8 from, the full amount of which is unknown to your orator, but which in equity belongs to him, and should be accounted for by the said defendant, and paid over to your orator as the avails of his exclusive rights aforesaid, and profits and gains which he would have derived therefrom but for the unlawful acts of the said defendant; and, generally, that your orator has reason to believe

and fear, and does believe and fear, that he will continue to suffer great and irreparable damage and injury, unless the said defendant be enjoined from further intringing said reissued letters patent.

6. That your orator has no adequate remedy in the premises, save in a court of equity, where matters of this nature are properly cognizable.

7. To the end, therefore, that the said defendant, Sargent & Company, may answer the premises (but not under oath, an answer under oath being hereby expressly waived), and may disclose and discover the number of transom-lifters it has made and sold embodying and containing said improvements and inventions described in said reissued letters patent No. 9307, and specified and claimed in the third claim thereof; that the said defendant, Sargent & Company, its officers, agents, attorneys, clerks, servants and workmen, may be restrained and enjoined, as well preliminarily and provisionally as perpetually, from the further infringement of the third claim of said reissued letters patent; that the said defendant, Sargent & Company, may be decreed to account with and pay over to your orator all the gains, savings, profits, and advantages to be duly determined, made, derived or received by it from the manufacture and sale of said patented improvements and inventions, in violation of your orator's rights as aforesaid, and also all damages resulting to your orator from the said infringement by the said defendant, together with such increase over the actual damages suffered as is warranted by law and may seem just and proper; and
9 that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience, and as to your honors shall seem meet—

May it please your honors to grant unto your orator the writ of subpœna, issued out of and under the seal of this honorable court, directed to the said defendant, Sargent & Company, commanding it, by a certain day and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises, and to stand to and abide by such order and decree as may be made against it; and also the writ of injunction, as well preliminary and provisional as perpetual, issuing out of and under the seal of this honorable court, enjoining and restraining the said defendant, Sargent & Company, its officers, agents, attorneys, clerks, servants and workmen, as is heretofore in that behalf prayed.

And your orator will ever pray, etc.

JOHN F. WOLLENSAK.

BANNING & BANNING,
Solicitors for Complainant.
C. R. INGERSOLL, *Of Counsel.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss:

John F. Wollensak, the above-named complainant, being duly sworn, upon oath says that he has read the foregoing bill subscribed by him and knows the contents thereof, and that the same is true

of his own knowledge, except as to matters therein stated on information and belief, and as to these he believes it to be true; and that he verily believes said reissued letters patent No. 9307 to be good and valid in law, and the title thereto vested in him, as alleged in said bill.

JOHN F. WOLLENSAK.

Subscribed and sworn to before me, this 23d day of December, A. D. 1887, as witness my hand and official seal as clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, the day and date last aforesaid.

[SEAL.] WM. H. BRADLEY, *Clerk.*

J. F. WOLLENSAK.

TRANSOM LIFTER.

No. 9,307. Reissued July 20, 1880.

Fig 1.

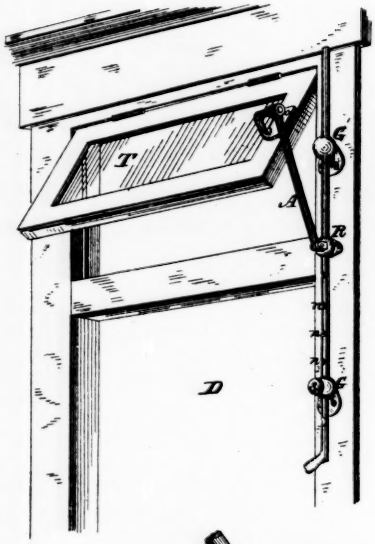
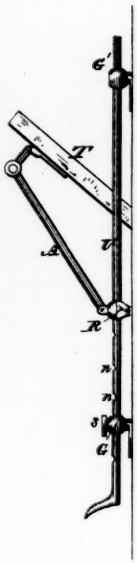


Fig 2.



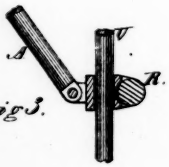


Fig 3.

No. 150
Wollensak
v.
Sargent & Co
p. 11a

WITNESSES
Harry Haig
William Blackstock.

By

INVENTOR
John F. Wollensak
L. Hill
his Attorney.

11 UNITED STATES PATENT OFFICE.

JOHN F. WOLLENSAK, of Chicago, Illinois.

Transom-lifter.

Specification forming part of Reissued Letters Patent No. 9307, dated July 20, 1880. Original No. 136,801, dated March 11, 1873. Application for reissue filed September 17, 1878.

To all whom it may concern:

Be it known that I, JOHN F. WOLLENSAK, of Chicago, in the county of Cook and State of Illinois, have invented certain new and useful improvements in transom lifters and locks; and I do hereby declare the following to be a full and exact description of the same, reference being had to the accompanying drawings, forming part of this specification, in which—

(Here follows diagram marked p. 11*a*.)

Figure 1 is a perspective view, showing one means for carrying my invention into operation. Fig. 2 is a side elevation of the same, and Fig. 3 is a detached sectional view.

Similar letters of reference in the several figures denote the same parts.

Transom-lifters have heretofore been constructed with a long upright rod or handle jointed at its upper end to a lifting-arm which extends to and is connected with the side or edge of the transom-sash, the sash being opened or closed by a vertical movement of the long rod. When thus constructed the upright rod is liable to be bent by the weight of the transom, owing to the want of support at or near the point of junction between the long rod and the lifting-arm.

The object of my invention is to remedy this difficulty; and to such end it consists in providing the proper support or support and guide for the upper end of the lifting-rod during its vertical movements and while at rest.

This may be accomplished in a variety of ways, one of which I will now proceed to describe in detail, although I wish it clearly understood that I do not limit my invention to this construction, but regard it as covering broadly any construction, combination, or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom.

In the drawings, D is the door; T, the transom-sash, pivoted at top, bottom, or middle, as preferred; A, the lifting-arm that connects the sash to the upright rod; U, the upright rod, passing through two guides, G G′, one above and one below the point of junction with the lifting-arm; R, a friction-roller secured to the lifting-rod so as to bear against the wall and support said rod at its

point of junction with the lifting-arm; *u u*, notches cut in the upright rod to receive the end of the set-screw; and *s*, a set-screw arranged, in connection with the lower guide and the rod U, so as to be convenient of operation for the purpose of fixing the transom at any required angle. The upright rod is thus supported at three points—to wit, above, below, and at the joint where it sustains the weight of the transom. It can also be adjusted and securely fastened so as to open the sash as much or as little as may be desired, and to lock it in that position.

Having thus described my invention, what I claim as new is—

1. The combination, with a transom, its lifting-arm and operating-rod, of a guide for the upper end of the operating-rod, to prevent it from being bent or displaced by the weight of the transom.

2. The roller R, arranged at the junction of the lifting-arm A and upright rod U in a transom-lifter, substantially as and for the purpose described.

3. The guide G′, arranged above the junction of the lifting-arm and upright rod, in combination with the prolonged rod U, the guide G, and arm A, substantially as and for the purpose specified.

JOHN F. WOLLENSAK.

Witnesses:
T. W. GRAY.
L. A. DOOLITTLE.

And on the same day a writ of subpœna issued out of court, directed to the said respondent, which was duly served and returned, and which, with the return of service endorsed thereon, is in the words and figures following, viz:

12 [SEAL.] The President of the United States of America to the marshal of the district of Connecticut sendeth greeting:

You are hereby commanded to summon Sargent and Company, a corporation organized under the laws of the State of Connecticut and located and doing business in the city of New Haven, in the State and district of Connecticut, respondent to the bill herein, to appear before the judges of the circuit court of the United States of America for the district of Connecticut, in the second circuit, in equity, on the first Monday of February, 1888, wheresoever the said court shall then be, to answer a bill of complaint exhibited against said respondent in said court by John F. Wollensak, of Chicago, in the State of Illinois, and then and there to answer the same and to do and abide by what said court may order and decree in the premises.

Make due service and return at least twenty days before said first Monday of February, 1888.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Hartford, this 29th day of December, A. D. 1888.

E. E. MARVIN, *Clerk.*

The defendant is required to enter its appearance in said cause, in the clerk's office of said court, on or before the day at which this writ is returnable, or, by the rules of said court, said bill will be taken as confessed.

E. E. MARVIN, *Clerk.*

BANNING & BANNING,
60 & 61 *Honore Building,*
Chicago, Illinois, Complainant's Solicitor.
C. R. INGERSOLL,
New Haven, Conn., of Counsel.

12½ JOHN F. WOLLENSAK *vs.* SARGENT & COMPANY. } No. 586. In Equity.

Be it remembered that on the 29th day of December, 1887, there was filed in court a bill in equity, which is in the words and figures following, viz:

13 Circuit Court of the United States, District of Connecticut.

JOHN F. WOLLENSAK *vs.* SARGENT & COMPANY. } In Equity. Reissue No. 10264.

Bill.

To the honorable the judges of the circuit court of the United States for the district of Connecticut:

John F. Wollensak, of the city of Chicago, in the State of Illinois, and a citizen of the State of Illinois, complainant, brings this his bill against Sargent & Company, of the city of New Haven, in the State of Connecticut, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, defendant; and thereupon your orator complains and says:

1. That prior to the 10th day of March, A. D. 1874, your orator was the original and first inventor and discoverer of a new and useful improvement in transom-lifters not known or used by others before his invention thereof and which had not at the time of his application for a patent therefor been in public use or on sale in this country for more than two years, as your orator verily believes, and that upon application therefor letters patent of the United States No. 148,538 were issued to your orator, dated the said 10th day of March, 1874, granting to him, his heirs or assigns, for the term of seventeen years, the sole and exclusive right and privilege of making, using, and vending to others to be used the said invention, as by reference to said letters patent, here in court to be produced, if required, will more fully appear.

2. That said letters patent, being afterwards considered to
14 be inoperative or invalid by reason of an insufficient or defective specification, which insufficiency or defect resulted

through inadvertence, accident, or mistake, and without any fraudulent or deceptive intent on the part of your orator, were afterwards surrendered and duly cancelled by the Commissioner of Patents; that thereupon and upon due application therefor reissued letters patent of the United States No. 10264 were issued to your orator, dated the 26th day of December, 1882, granting to him, his heirs or assigns, for the term of seventeen years from the said 10th day of March, 1874, the full and exclusive right and privilege of making, using, and vending to others to be used the said invention, as by reference to said reissued letters patent, here in court to be produced, and a copy of the specification and drawings of which is hereto attached, will more fully appear; that your orator is, and ever since the granting thereof has been, the sole owner of said reissued letters patent; that said reissued letters patent were applied for in good faith and not for any fraudulent or improper purpose; that, as your orator verily believes, no other person, firm, or corporation not acting under his authority ever began the manufacture, sale, or use of transom-lifters containing or embodying said inventions or improvements until long after your orator had consulted counsel and taken steps toward applying for said reissue and until long after your orator had applied for and obtained a reissue of his previous patent on transom-lifters, having broader claims than any now contained in said reissue No. 10264; that in making said application for said last-mentioned reissue your orator presented to the Patent Office a full sworn statement of facts and circumstances connected with his applying for and obtaining said original patent No. 148,538 and with his delay in applying for said reissue; that upon discovering the mistake in his said original patent No. 148,538, that it did not fully cover and claim his inventions, he wrote his solicitors, Messrs. Hill & Elsworth, of Washington, D. C., in reference thereto and asking their advice about applying for a reissue thereof; that, according to his best recollection, he wrote his said solicitors at least three or four times in reference to applying for such a reissue before he received any answer or advice from them; that after considerable delay, occasioned, as your orator is informed and believes, by the sickness of Mr. Elsworth, who had his said matters specially in charge, his said solicitors advised your orator by a letter dated April 9, 1878, not to apply for a reissue of said patent No. 148,538, but to apply for a reissue of a patent previously issued to your orator for an improvement in transom-lifters, to wit, patent No. 136,801, dated March 11, 1873, this advice being given, as stated in said letter, after a careful examination of all your orator's patents issued prior to the date thereof; that, pursuant to this advice, your orator applied for and obtained a reissue of said last-mentioned patent No. 136,801, the application therefor being filed in the Patent Office on the 17th of September, 1878; that after various proceedings, including an appeal to the examiners-in-chief, which was finally decided in your orator's favor on the 23d of June, 1880, said application was allowed and a reissue of said first patent granted to your orator, dated July 20, 1880, No. 9307; that immediately there-

after, to wit, on the 27th day of September, 1880, your orator, supposing and being advised that said last-mentioned reissued patent was good and valid in law and sufficient to protect him in the use of said invention, filed a bill in equity in the circuit court of the United States for the northern district of Illinois against one Frank A. Reiher to restrain him from infringing the same, which suit was decided by his honor Judge Drummond on the
16 25th of April, 1882, against your orator; that, notwithstanding the advice of his counsel above mentioned, your orator afterwards caused his solicitor to prepare an application for a reissue of said patent No. 148,538, which application was executed by him on the 21st of August, 1880, and which contained substantially all the claims now appearing in said reissue No. 10264 and others; that immediately after the execution thereof your orator sent said application to his solicitor, Mr. Elsworth, with all the money necessary to pay his fees and expenses of filing the same, but that, for some reason unknown to your orator, said application was never filed in the Patent Office; that his said solicitor, Mr. Elsworth, died in January, 1881, or about that time, and your orator thereupon retained other counsel, to wit, Messrs. Banning & Banning, to take charge of said infringement suit above mentioned and to attend to his other patent business; that shortly after retaining them as aforesaid your orator consulted his said last-named counsel in reference to the filing of said reissue application; that said counsel advised him that, inasmuch as he had a patent in terms broad enough to cover said invention and protect him in the use thereof, he had better delay the filing of said application until said infringement suit could be heard and determined; that the delay in applying for a reissue of said patent after your orator became aware of the defect in the original patent, No. 148,538, was caused by the advice and matters aforesaid, and that the delay that occurred before that time was due to the fact that your orator was young and inexperienced in such matters, never before having had occasion to take out a reissue patent or otherwise become familiar with the law in relation to reissues, and to the further fact that your orator was then struggling to build up his business and unable to incur
17 or assume any more expense in the obtaining of patents than was considered actually necessary for the protection of his business; that your orator never in any way intended to abandon any of the inventions made by him and described and shown in said original patent; that at the first said reissue application was rejected on the ground that such statement, furnished as aforesaid, did not show or furnish any sufficient explanation or excuse for said delay, and that your orator had lost his rights to such a reissue by reason thereof, the examiner citing Miller *v.* Brass Co. (104 U. S., 350) and other cases; that on appeal said decision or rejection was reversed by the examiners-in-chief constituting the Patent Office board of appeal; that, in a long and full opinion, said examiners-in-chief expressly held that your orator had sufficiently and satisfactorily explained said delay and was still entitled to such a reissue,

and that a part of said opinion, referring to claims appearing in said reissue and now in controversy, was as follows:

"All the above claims, moreover, have been rejected upon a supposed legal bar to enlargement of claim found in certain recent decisions of the courts, mainly of the Supreme Court of the U. S., on which the other decisions cited are based. * * * We find upon review that there was a grave defect in applicant's patent and claims, whereby it was inoperative to protect the invention disclosed by him to the full extent to which he was entitled. * * * We do not find any evidence of such laches or delay after ascertaining the defects of his patent as to debar or estop him from the benefits of the statute. We do not find in his renewed application any attempt to enlarge the scope of his invention beyond what was originally disclosed, but, on the contrary, an attempt to secure protection for the invention contained in the patent."

18 3. That your orator verily believes that he was the first inventor and discoverer of said improvements and inventions described and claimed in said reissued letters patent, and that said reissued letters patent are good and valid in law; that excepting the said Frank A. Reiher, against whom your orator has obtained an injunction as aforesaid, and one other company which has started recently (and against which your orator now has claim pending) the public generally have for a period of more than thirteen years acknowledged and acquiesced in the validity of said original and reissued letters patent, and, so far as your orator knows, no other person, firm, or corporation, excepting the said persons above referred to, has ever disputed the validity thereof or in any way before the infringement hereinafter complained of attempted to enter upon the manufacture or sale of transom-lifters of the kind described and claimed therein; that the exclusive rights and privileges secured by said reissued letters patent are of great value; that your orator is and long has been engaged in manufacturing and selling transom-lifters containing said inventions and improvements and has a large and established business and a large amount of money invested therein; that he is now and for about fourteen years last past has been able and willing to supply all the demands of the public therefor; that the public has derived great benefits from his said invention, and that if protected in the enjoyment of his exclusive rights secured to him by said reissued letters patent and various other letters patent issued to him for improvements in the same line your orator believes he will hereafter continue to realize large gains and profits from the manufacture and sale of such transom-lifters.

19 4. That on or about the 11th day of December, 1886, your orator filed his bill of complaint in the circuit court of the United States for the northern district of Illinois against one Frank A. Reiher, charging him with an infringement of the third, fourth, fifth, sixth, and ninth claims of said reissued letters patent No. 10264 and praying for an injunction and account against him; that in said bill your orator presented a full and true statement of all the facts and circumstances connected with his applying for and

taking out said reissued letters patent, which was particularly intended as an explanation or excuse for his delay in applying therefor, and which was almost literally the same as the statement above given; that afterwards, to wit, on the 16th day of February, 1887, the defendant filed a demurrer to said bill, which demurrer was heard by his honor Judge Henry W. Blodgett on the third day of June, 1887; that, as your orator is informed and believes, although the counsel for said defendant was not present at said hearing, said judge himself specially spoke of and considered the effect of the decision of the Supreme Court reported in 115 U.S., 96–102, and also suggested the question whether said statement of facts contained in said bill presented a sufficient explanation or excuse for your orator's delay in applying for said reissue No. 10264, finally stating, in substance, that these questions were of such importance that he would have to take time to give them careful and deliberate consideration, and thereupon taking said cause under advisement; that afterwards, to wit, on the 6th day of June, 1887, said judge announced his decision, overruling said demurrer, and that afterwards, to wit, on the 5th day of July, 1887, the said defendant having failed to file an answer or make any further defense, an interlocutory decree was entered in said cause, ordering a perpetual injunction, pursuant to the prayer of said bill, and referring said cause to a master to take an account of profits and damages, on which reference it is still pending.

5. That since the granting of said reissued letters patent and at divers times and occasions prior to the filing of this your orator's bill the said defendant, Sargent & Company, well knowing the premises and in infringement of the third, fourth, fifth, sixth, and ninth claims of said reissued letters patent and in violation of the exclusive rights of your orator thereunder and without the license of your orator, at New Haven, to wit, at the district aforesaid, has made and sold and still continues to make and sell transom-lifters embodying and containing said inventions and improvements described in said reissued letters patent No. 10264 and particularly specified and claimed in the third, fourth, fifth, sixth, and ninth claims thereof; that for many years the said defendant has been handling transom-lifters of your orator's manufacture, and in this way it has become familiar therewith and with the demands of the market therefor; that, having thus become familiar with said business and with the trade established and built up by your orator at great labor and expense as aforesaid, the said defendant has recently entered upon the manufacture and sale of said infringing transom-lifters; that said defendant has been notified of its said infringement and requested to desist therefrom, but that it refuses so to do; that great and irreparable damage and injury have resulted to your orator by reason of said infringement and great gains and profits have accrued to the said defendant therefrom, the full amount of which is unknown to your orator, but which in equity belongs to him and should be accounted for by the said defendant and paid over to your orator as the avails of his exclusive

rights aforesaid and profits and gains which he would have
21 derived therefrom but for the unlawful acts of the said defendant; and, generally, that your orator has reason to believe and fear and does believe and fear that he will continue to suffer great and irreparable damage and injury unless the said defendant be enjoined from further infringing said reissued letters patent.

6. That your orator has no adequate remedy in the premises save in a court of equity, where matters of this nature are properly cognizable.

7. To the end, therefore, that the said defendant, Sargent & Company, may answer the premises (but not under oath, an answer under oath being hereby expressly waived) and may disclose and discover the number of transom-lifters it has made and sold embodying and containing said improvements and inventions described in said reissued letters patent No. 10264 and specified and claimed in the third, fourth, fifth, sixth, and ninth claims thereof; that the said defendant, Sargent & Company, its officers, agents, attorneys, clerks, servants, and workmen, may be restrained and enjoined, as well preliminarily and provisionally as perpetually, from the further infringement of the third, fourth, fifth, sixth, and ninth claims of said reissued letters patent; that the said defendant, Sargent & Company, may be decreed to account with and pay over to your orator all the gains, savings, profits, and advantages, to be duly determined, made, derived, or received by it from the manufacture and sale of said patented improvements and inventions, in violation of your orator's rights as aforesaid, and also all damages resulting to your orator from the said infringement by the said defendant, together with such increase over the actual damages suffered as is warranted by law and may seem just and proper, and that your orator may have such other and further relief in
22 the premises as may be agreeable to equity and good conscience and as to your honors shall seem meet—

May it please your honors to grant unto your orator the writ of subpœna, issued out of and under the seal of this honorable court, directed to the said defendant, Sargent & Company, commanding it, by a certain day and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises and to stand to and abide by such order and decree as may be made against it; and also the writ of injunction, as well preliminary and provisional as perpetual, issuing out of and under the seal of this honorable court, enjoining and restraining the said defendant, Sargent & Company, its officers, agents, attorneys, clerks, servants, and workmen, as is heretofore in that behalf prayed.

And your orator will ever pray, etc.

JOHN F. WOLLENSAK.

BANNING & BANNING,
Solicitors for Complainant.
C. R. INGERSOLL, *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

John F. Wollensak, the above-named complainant, being duly sworn, upon oath says that he has read the foregoing bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to these he believes it to be true, and that he verily believes said reissued letters patent No. 10264 to be good and valid in law and the title thereto vested in him, as alleged in said bill.

JOHN F. WOLLENSAK.

23 Subscribed and sworn to before me this 23rd day of December, A. D. 1887, as witness my hand and official seal as clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, the day and year last aforesaid.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[Seal of Circuit Court, Connecticut.]

23*a* C 4.

Reissue.

THE UNITED STATES OF AMERICA.

[Vignette.]

No. 10264.

To all to whom these presents shall come:

Whereas John F. Wollensak, of Chicago, Illinois, has presented to the Commissioner of Patents a petition praying for the reissue of letters patent for an alleged new and useful improvement in transom-lifters, for which letters patent were issued to him dated March 10, 1874; which letters having been surrendered, the same have been canceled and new letters ordered to issue to him on an amended specification, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and

Whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law:

Now, therefore, these letters patent are to grant unto the said John F. Wollensak, his heirs or assigns, for the term of seventeen years from the tenth day of March, one thousand eight hundred and seventy-four, the exclusive right to make, use, and vend the said invention throughout the United States and the territories thereof.

In testimony whereof I have hereunto set my hand and caused

Seal Patent Office, United States of America.

the seal of the Patent Office to be affixed, at the city of Washington, this twenty-sixth day of December, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

M. L. JOSLYN,
Acting Secretary of the Interior.

Countersigned.
E. M. MARBLE,
Commissioner of Patents.

[Endorsed:] 1874. Reissue. #10264. Tran. lifter.

J. F. WOLLENSAK.

TRANSOM LIFTER.

No. 10,264. Reissued Dec. 26, 1882.

Fig. 1.

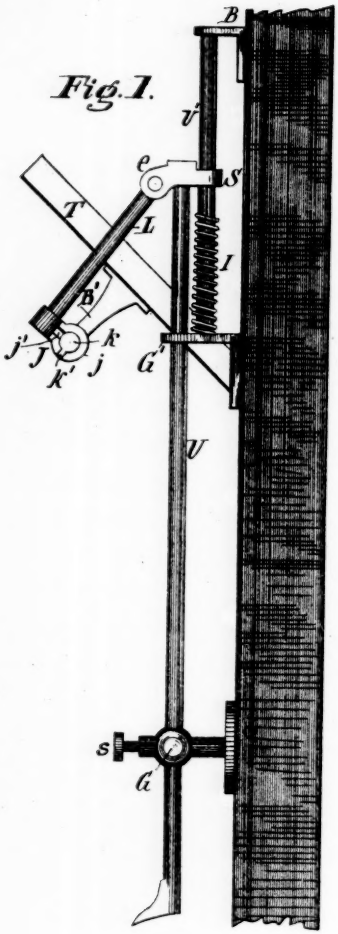
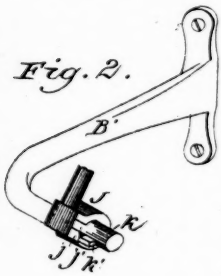


Fig. 2.



No. 15a
Wollensak
v.
Sargent & Co.
} Fb. 23 6

Fig. 3

Inventor:
John. F. Wollensak

Attest:
Hyam Smith
Thomas A. Banning

23*c*

UNITED STATES PATENT OFFICE.

JOHN F. WOLLENSAK, of Chicago, Illinois.

Transom-lifter.

Specification forming part of Letters Patent No. 10264, dated December 26, 1882. Original No. 148,538, dated March 10, 1874. Application for reissue filed May 31, 1882.

To all whom it may concern:

Be it known that I, JOHN F. WOLLENSAK, of Chicago, in the county of Cook and State of Illinois, have invented certain new and useful improvements in transom-lifters; and I do hereby declare the following to be a full and exact description of the same, reference being had to the accompanying drawings, forming part of this specification, in which—

(Here follows diagram marked p. 23*b*.)

Figure 1 is a side elevation, and Figs. 2 and 3 views of parts in detail.

Similar letters of reference in the accompanying drawings denote the same parts.

This invention is an improvement upon my patent dated March 11, 1873, No. 136,801, in which provision was made against the bending of the long upright rod or handle of the transom-lifter by the weight of the sash at the point where it was jointed to the lifting-arm connected to the side or edge of the sash, this being accomplished by prolonging the upright rod above the point of junction of the lifting-arm and providing said upright rod with a friction-roller at the point of junction, said roller bearing against the wall and helping to sustain the weight of the sash.

The object of the present invention is to provide means for supporting the upright rod against the bending pressure of the sash when the latter is hinged at its bottom, and at the same time prevent the breakage of glass in the transom in case the latter is allowed to fall suddenly.

It also has for its object to provide improved means for connecting the lifting-arm to the transom.

To these ends the invention consists, first, in jointing the lifting-arm to its operating rod or handle at the upper end of the latter, and in providing the operating rod or handle with a socket at or near its junction with the lifting-arm, said socket sliding on a stationary upright rod attached to the wall; secondly, in interposing a spiral spring on the stationary rod between the sliding socket and the upper guide-bracket of the operating-rod in such manner as to sustain the weight of the sash when it is lowered, and prevent any sharp concussion when the transom falls suddenly; and, finally, in a bayonet-joint connecting the lifting-arm to the bracket on the

transom, said joint being formed by a tongue on the end of the bracket and a corresponding slot in the socket on the arm, the parts being so arranged that they cannot be disconnected in any part of the arc described by the transom when the lifting-arm is attached to the operating-rod, all of which I will now proceed to describe.

In the drawing, T is the transom-sash, pivoted or hinged in the present instance at its lower edge; L, the lifting-arm, that connects the sash to the upright rod; U, the upright rod, passing through two guides, G G′, both of which are located below the junction of the rods L U, the guide G being provided with a set-screw, *s*, arranged to hold the rod U at any point desired. The upright rod U, instead of being prolonged at its upper end above its junction with the lifting-arm, as in my former patent, terminates at that point, and is provided at the front with ears *e*, to which the lifting-rod is pivoted, and at the rear with a socket, S, which incloses and slides upon a stationary upright rod or long guide, U′. The latter is supported at its lower end below the socket S by the bracket composing the guide G′ of the rod U and at its upper end by a bracket, B.

I represents a spiral spring, inclosing the rod U′ between the socket S and the guide G′.

B′ is a reversible bracket on the transom-sash, adapted to be inserted from either side of the socket on the lifting-arm L. It will be seen that the weight of the sash is supported equally by the rods U U′ and their brackets, and cannot bend either. When the sash is lowered until the socket S comes in contact with the upper end of the spring I its weight is sustained by the latter vertically. Consequently when the sash is allowed through carelessness to fall suddenly the spring relieves the shock which would otherwise occur, and prevents damage to the glass. The lifting-arm L is attached to the bracket B′ of the transom-sash by a bayonet-joint, J, the end of the arm having a socket, *j*, with a slot, *j′*, and the bracket having a pin or bearing, *k*, with a tongue, *k′*, adapted to enter the socket and its slot when the tongue and slot are in line. The latter parts are so arranged, however, that they cannot come in line in any portion of the arc described by
2 3*d* the bracket B′ in the operation of the transom, so that the arm and bracket cannot be disconnected while in working position.

The advantages resulting from these improvements are obvious, the spring guarding against any liability of breaking the glass, and the joint facilitating the connection of the lifting-arm to the bracket of the sash.

In heavy transoms I propose to employ the devices described at each end of the sash, making it doubly secure against accident.

Having thus described my invention, what I claim as new is—

1. The stationary upright rod U′, supported by brackets G′ B, and provided with a spiral spring, I, in combination with the movable upright rod U, having the socket S, arranged at or near the junction of the rod U, and lifting-arm L, substantially as described, for the purpose specified.

2. The lifting-arm L, having the socket *j* and slot *j'*, in combination with the transverse bracket B', having the pin or bearing *k* and tongue *k'*, arranged and operating substantially as and for the purpose specified.

3. The combination, with a transom-window, of the bracket B', lifting-arm L, long guide U', and lifting-rod U, having sliding connection with guide-rod U', all substantially as described, and for the purposes set forth.

4. The combination, with a transom-window and its vertical lifting-rod, of a long stationary guide and support for the upper end of the vertical lifting-rod, by which the latter is held to a rectilineal path through suitable connections, substantially as described, and for the purposes set forth.

5. The combination, with a transom-window, of the separate guide U', socket S, and vertical lifting-rod, substantially as described, and for the purposes set forth.

6. The combination, with a transom-window, of the guide U', guide-socket S, vertical lifting-rod U, and connecting rod or arm L, and suitable transom-connections, all substantially as described, and for the purposes set forth.

7. The combination, with the lifting-rod and the means by which it is connected to the transom, of a spring to receive the shock of the window in falling or swinging suddenly, substantially as described, and for the purposes set forth.

8. The stationary upright rod or guide U', supported on the casing and provided with a spiral spring, I, in combination with the movable upright rod U, having the socket S, arranged at or near the junction of said rod with the lifting-arm L, and suitable transom-connections, all substantially as described, and for the purposes set forth.

9. The combination, with a transom lifting-rod and lifting-arm, of a reversible bracket, B', for connecting the transom with the lifting-arm, substantially as described, and for the purposes set forth.

JOHN F. WOLLENSAK.

Witnesses:
CHARLES C. LINTHICUM.
THOMAS A. BANNING.

24 And on the same day a writ of subpœna issued out of court, directed to the said respondents, which was duly served and returned and which, with the return of service endorsed thereon, is in the words and figures following, viz:

25 [SEAL.] The President of the United States of America to the marshal of the district of Connecticut sendeth greeting:

You are hereby commanded to summon Sargent and Company, a corporation organized under the laws of the State of Connecticut and doing business in the city of New Haven, in the State and district of Connecticut, respondent to the bill herein, to appear before

the judges of the circuit court of the United States of America for the district of Connecticut, in the second circuit, in equity, on the first Monday of February, 1888, wheresoever the said court shall then be, to answer a bill of complaint exhibited against said respondent in said court by John F. Wollensak, of Chicago, in the State of Illinois, and then and there to answer the same and to do and abide by what said court may order and decree in the premises. Make due service and return at least twenty days before said first Monday of February, 1888.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Hartford, this 29th day of December, A. D. 1887.

E. E. MARVIN, *Clerk.*

The defendant is required to enter its appearance in said cause in the clerk's office of said court on or before the day at which this writ is returnable, or by the rules of said court said bill will be taken as confessed.

E. E. MARVIN, *Clerk.*

BANNING & BANNING,
60 & 61 *Honore Building, Chicago, Illinois, Complainant's Solicitor.*

C. R. INGERSOLL,
New Haven, Conn., of Counsel.

26 And on the same day Messrs. Banning & Banning appeared for the complainant, and on the 12th day of January, 1888, J. K. Beach and B. F. Thurston, Esqrs., appeared for the defendants.

And on the 12th day of January, 1888, the parties, by their counsel, duly appeared, and said motions for temporary injunctions were fully heard.

And on the 13th day of March, 1888, opinion of court was filed in the words and figures following, viz:

27 Circuit Court of the United States for the District of Connecticut.

JOHN F. WOLLENSAK *vs.* SARGENT & COMPANY. } Nos. 585, 586, and 587.

SHIPMAN, *J.:*

These are motions for preliminary injunctions in three bills in equity, which are founded upon the alleged infringement of four patents, all issued to the complainant, three being for improvements in transom-lifters, and the fourth being for an improved sky-light lifter.

The first patent is reissue No. 9307, dated July 20th, 1880. The original patent was No. 136,801, dated March 11th, 1873.

The second patent is reissue No. 10264, applied for May 31, 1882, and issued December 26th, 1882. The original patent was No. 148,538, dated March 10th, 1874.

The defendant is charged with infringing the 3rd, 4th, 5th, 6th, and 9th claims of the reissue.

The third patent is No. 191,088, dated May 22, 1877, and the fourth is No. 196,851, dated November 6th, 1877.

Reissue 9307:

This, although a narrow patent, is by far the most important one of the number.

In both the original and the reissued patents the state of the art and the object of the invention are described as follows:

"Transom-lifters have heretofore been constructed with a long upright rod or handle, jointed at its upper end to a lifting arm, which extends to and is connected with the side or edge of the transom sash, the sash being opened or closed by a vertical move-
28 ment of the long rod. When thus constructed the upright rod is liable to be bent by the weight of the transom, owing to the want of support at or near the point of junction between the long rod and the lifting arm.

"The object of my invention is to remedy this difficulty, and to such end it consists in providing the proper support or support and guide for the upper end of the lifting rod during its vertical movements and while at rest. This may be accomplished in a variety of ways, one of which I will now proceed to describe in detail."

The third claim, which is the only one alleged to be infringed and which is the same as the original second claim, is as follows:

"3. The guide G, arranged above the junction of the lifting arm and upright rod, in combination with the prolonged rod U, the guide G, and arm A, substantially as and for the purpose specified."

The first claim of the reissue is a broad*er* one, and was not contained in the original patent.

In Wollensak *vs.* Reiher, 115 U. S., 87, this reissue was examined by the Supreme Court, which defined the extent of the patented invention as follows:

"The specification of the complainant's patent undertakes broadly to describe the invention intended to be embraced in it as 'any construction, combination, or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom.' But, having reference to the state of the art at the date of the alleged invention and the claims of the patent, the patentees must be limited to the combination, with a transom, its lifting arm and operating rod, of a guide for the upper end of the operating rod, prolonged beyond the junction with the lifting arm so as to prevent the operating-rod from
29 being bent or displaced by the weight of the transom. Putting by the question whether this is a patentable invention in view of the existing state of the art, the claim must be regarded as a narrow one and limited to the particular combination described."

Thereupon the first claim of the reissue was disclaimed and the patent was limited to the second and third claims.

In this case, infringement of the third claim not being denied, the only question is the one which was mentioned but was not decided by the Supreme Court, viz., whether the invention is a patentable one in view of the existing state of the art.

It will be noticed that the specification states that whereas, before the invention, the long upright rod of the transom-lifter was jointed at its upper end to a lifting arm, which was connected with the edge of the transom, the patented improvement consisted in providing a proper support, or support and guide, for the upper end of the lifting rod, in order to prevent its being bent by the weight of the transom, and it further appears from the decision of the Supreme Court that the mechanical means were a guide or loop for the upper end of the operating rod, prolonged beyond the junction with the lifting arm.

The guide above the junction and the prolongation of the rod constitute the improvement.

In the absence of other knowledge in regard to the state of the art than that disclosed by the patent, the patentable character of the invention would seem to me to be but slender, because the strengthening and support of the rod by means of its extension and its confinement within an additional metallic loop or eye seem to be the obvious suggestions which would naturally occur to a mechanic.

This doubt receives some additional strength from the Bayley and McClusky patent of July 7, 1869, which described an invention for opening and closing a series of railroad passenger-car ventilators or transoms. It consisted of a long rod sliding horizontally in a series of guides past the series of windows and connected with each window by a separate arm, so that by sliding the rod forwards or backwards the windows will be opened or shut. The device held vertically instead of horizontally closely resembles the plaintiff's lifter.

This is not an anticipation of the patent in suit, because there is no lifting of a window which bears its weight upon the rod, and in order to open a series of light ventilators by a horizontally moving rod the same precautions against the bending of the rod are not required which are not necessary to overcome the direct weight and pressure of a heavy transom upon a rod which moves vertically.

The only fact connected with the patent which I now regard of importance is that the inventor naturally extended his rod beyond the end window and beyond the junction of the rod with the lifting arm connected with that window and supported the rod in a guide-eye, and thus indicated that, given a transom or series of transoms to be opened by a long rod moving horizontally or vertically, which opens each transom by a lifting arm connected therewith, there must naturally be an extension of the rod for a greater or less distance beyond the junction and a support for the end of the prolonged rod.

It is said that the validity of this patent has been settled by ac-

quiescence of the public therein and by an adjudication of the circuit court for the northern district of Illinois.

The defendant in Wollensak *v.* Reiher successfully defended against a broad construction of the first claim of the reissue before the circuit and supreme courts. After the disclaimer a new bill against the same defendant was filed in the circuit court for the northern district of Illinois, which was demurred to, it is said, upon the ground of the non-patentability of the third claim, which
31 was manifest upon the face of the patent.

The defendant did not appear to argue his demurrer, and after it was overruled abandoned further litigation.

I do not think that the overruling of a demurrer which the defendant refused to argue can be fairly considered to be an adjudication in favor of patentability.

Neither, in view of the litigation and its results, has there been such an acquiescence in the validity of the reissue as to raise a presumption in its favor.

Neither did the acts of those who represented the defendant in the city of New York, in soliciting and inserting advertisements of the Wollensak lifter in their trade catalogue, create such equities as to call upon the court to stop the defendant's present infringement. The decision of the supreme court had the effect of casting a doubt upon the patentability of the invention, so that the manufacturers were justified in a new examination of the character of the patent, notwithstanding their former policy of non-interference or of affirmative recognition of its validity.

There is, in my opinion, such a fair and reasonable question in regard to the validity of the third claim as to prevent the issuing of an injunction *pendente lite* against its infringement.

Reissue No. 10264.

The invention of this reissue was an improvement upon the lifter described in reissue 9307. It provided "means for supporting the upright rod against the bending pressure of the sash when the latter is hinged at the bottom," and "improved means for connecting the lifting arm to the transom."

The only question which need now be considered is in regard to the validity of the claims which are said to have been infringed.

32 This reissue has also been before the Supreme Court in Wollensak *v.* Reiher, 115 United States, 96, in which case a demurrer to the bill was sustained upon the ground that on the face of the bill, which contained copies of both original and reissued patents, the claims which were alleged to be infringed and which were the same as those which are the subject of this bill were expansions of the original claims and not covered by them, and that the manifest delay of two years or more in applying for the reissue made it invalid, unless accounted for and shown to be reasonable, and that the bill did not adequately explain the cause of the delay.

The question, therefore, for consideration is, whether the cause of the delay is now adequately explained and shown to be reasonable.

The original patent was granted in March, 1874. The reissue was applied for in May, 1882. The patentee shows reasons for the delay from 1878 to 1882; whether adequate or inadequate it is not necessary to consider, because he does not attempt to show any reason for the delay from 1874 to 1878. There was, so far as appears from the bill or from the affidavit, a contented acquiescence in the character and extent of his patent for four years, and therefore there was a delay, the cause of which has not been explained, for a period of time which compels the court to declare that the expanded claims are invalid. "The settled rule of decision is that if it appears, in cases where the claim is merely expanded, that the delay has been for two years or more, it is adjudged to invalidate the reissue, unless the delay is accounted for and excused by special circumstances which show it to have been not unreasonable."

33 *Patents Nos.* 191,088 *and* 196,851.

The first and second claims only of No. 191,088 are alleged to be infringed and are as follows:

"1. The sliding block C, carrying the spring locking bolt *g*, in combination with the fixed guide-bar B, connecting rod or rods *h*, and the operating cord or cords *f*, substantially as described, for the purpose specified.

"2. The combination of the operating cord *f* with the spring locking bolt *g* and the sliding block C, to which the sash is connected, arranged as described, so that the act of pulling the cord backward shall disengage the locking bolt from the bar B, and a continued downward pull upon the same cord shall raise the sash, substantially as described."

On final hearing of a bill in equity upon this patent founded upon the same infringement which this defendant has committed, viz., the construction of lifters under the Reiher patent No. 226,353, dated April 6, 1880, Judge Blodgett found the fact of infringement and construed the Wollensak patent as follows: "The elements in patent No. 196,851 seem to be, first, a long stationary guide provided with holes and notches to receive a spring locking bolt; second, a spring locking bolt adapted to fit into the holes or notches in the long stationary guide, and thus to lock, automatically, the transom at different degrees of openings; third, a sliding block or head piece carrying a spring bolt up and down the stationary guide, so that such spring bolt can automatically lock the transom at any desired point; and, fourth, means for disengaging the locking device and opening and shutting the transom with one hand and without changing the hold." (Wollensak *v.* Reiher, 28 Federal Reporter, 424.)

34 In the Reiher case the patent of William P. Hagadom, dated February 8th, 1876, in which a notches rod slides through a stationary socket, was before Judge Blodgett. In this case two additional patents, not in the Illinois case, are relied upon, one to John

E. Beauland, dated February 16, 1875, and the other to George Hayes, dated March 9, 1869. I do not think that the character of this additional evidence is such as to cause me to differ from the opinion of Judge Blodgett.

The specification of patent No. 196,851 says that "the present invention is an improvement upon the transom lifter and lock patented to me March 11, 1873, No. 136,801 (reissue 9307), and which consists in a long vertical rod guided in loops or eyes on the side of the door jamb and connected to the transom by a jointed arm, the upper eye being secured to the jamb above the junction of the rod with the pivoted arm for the purpose of guiding the upper end of the rod and preventing it from bending and binding under the weight of the transom.

My improvement consists in dispensing with the guide-eyes and employing instead a long metal plate slotted at the upper and lower ends and secured to or let into the door jamb over a vertical groove, in which the guide-rod is placed. The lower end of the rod is connected, through the slot, with an operating knob in front of the plate, and its upper end is also connected, through its slot, with the jointed arm, by which the transom is moved."

The claim of the patent was as follows:

"The plate C, slotted at both ends and attached to the door jamb, in combination with the guide or operating rod E, connected to the lifting arm of the transom, and carrying the lug *h*, at one end, and the adjustable knob G, at the other end, substantially as described, for the purpose specified."

35 The file-wrapper and contents of the patent were not before Judge Blodgett, who considered that, while the plate was a slotted one, it was not imperative that it should be actually slotted at both ends.

The file-wrapper and contents of the patent are in this case, and it appears that the claims in the application which simply described the plate as slotted were voluntarily erased, and the present claim of a plate slotted at both ends was inserted by amendment.

The slotted plate is the important thing in the patent, which is a very slight improvement upon reissue No. 9307, and I think should be strictly confined to the particulars to which the patentee limited his invention, as appears from the amendments to his application.

The defendant's lifter is not slotted at both ends, and is therefore not an infringement.

Let there be an injunction against an infringement of No. 191,088.

The other motions are denied.

Ephraim Banning and Charles R. Ingersoll, for the plaintiff.
John K. Beach and Benjamin F. Thurston, for the defendant.

And on the 13th day of March, 1888, defendant's answer was filed in the words and figures following, viz:

36 Circuit Court of the United States, District of Connecticut.

JOHN F. WOLLENSAK
vs.
SARGENT & CO. } In Equity. No. 585.

Defendant's Answer.

The defendant, for answer to so much of the bill of complaint herein as it is advised is material to be answered unto, answering, says:

It admits that letters patent of the United States were issued to the complainant dated the 11th day of March, 1873.

It admits that said letters patent were afterwards surrendered and cancelled and that new letters patent were issued to the complainant numbered 9307 and dated July 20th, 1880, but it denies that such surrender and reissue was because of any inadvertence or mistake, and it is ignorant whether the complainant is or has been the sole owner of said reissued patent and is entitled to sue for and receive to his own use all claims for profits and damages arising out of infringement thereof, and is ignorant whether the complainant has disclaimed the first claim thereof as alleged in said bill of complaint, and leaves the complainant to such proof thereof as he may be advised.

The defendant, further answering, denies that said John F. Wollensak was the first and original inventor of matters and things described and claimed in said reissued patent, but avers that long prior to any supposed invention thereof by said Wollensak the same and all material and substantial parts thereof were known to and in use by the following-named persons at the places set op-
37 posite their names respectively, and were fully and clearly shown and described in the following-named letters patent and printed publications, to wit:

Names of persons.	Names of places.

Name of Patent or Printed Publication.

U. S. letters patent to N. W. Speers, No. 7998, dated March 5th, 1851.

U. S. letters patent to Bayley & McCluskey, No. 79541, dated July 7th, 1869.

U. S. letters patent to F. E. Brown, No. 93408, dated August 10th, 1869.

The defendant, further answering, denies that said reissued letters patent are good and valid in law, but avers that the same was applied for and obtained for the purpose of enlarging the scope of the original letters patent and is not for the same invention as the original letters patent, and that said reissue was not applied for within a reasonable time after the grant of the original patent.

The defendant, further answering, avers that on the state of the art, as will fully appear at the trial hereof, no invention or discovery

was required to make and apply the combination specified in the third claim thereof.

The defendant has no knowledge or information as to the matters alleged in paragraph 3 of the bill of complaint, except that on information and belief it denies that said Wollensak was the first to originate a transom-lifter device of any kind.

The defendant has no knowledge or information as to the matters alleged in paragraph 4 of the bill of complaint, except that upon information and belief the defendant denies that the public
38 has acquiesced in the validity of said reissued letters patent.

The defendant admits that it has made and sold transom-lifters, but denies that it has infringed upon any lawful right of the complainant in so doing, and avers that the transom-lifters made by it are substantially similar to transom-opening devices known in the art long prior to the alleged invention of said Wollensak, and it denies that such knowledge of the business and of the trade as it possesses was derived from handling the complainant's transom-lifters.

All of which the defendant is ready to maintain and prove in such manner as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and damage in this behalf most wrongfully sustained.

SARGENT AND COMPANY,
By HENRY B. SARGENT, *Vice-pres.*

And on the 11th day of May, 1888, replication was filed in the words and figures following, viz:

39 Circuit Court of the United States, District of Connecticut.

JOHN F. WOLLENSAK *vs.* SARGENT & Co. } In Equity. No. 585.

The Replication of John F. Wollensak, Complainant, to the Answer of Sargent & Co., Defendant.

This repliant, saving and reserving unto himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant — and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

BANNING & BANNING,
Solicitors for Complainant.

40 And on the 13th day of March, 1888, defendant's demurrer to plaintiff's bill was filed in the words and figures following, viz:

Circuit Court of the United States, District of Connecticut.

JOHN F. WOLLENSAK
vs.
SARGENT & CO. } In Equity. No. 586.

The defendants demur to the bill of complaint herein for want of equity, and for cause therefor aver that upon comparison of the original and reissued letters patent exhibited with and referred to in said bill and upon the averments of the bill of complaint respecting the same the said bill of complaint does not set forth any equitable cause of action against the defendants in respect of the alleged infringement of the claims of the said reissued letters patent.

SARGENT AND COMPANY,
By HENRY B. SARGENT, *Vice-pres.*

UNITED STATES OF AMERICA, }
District of Connecticut, } *ss:*

Henry B. Sargent, being duly sworn, deposes that he is the vice-president of the defendant corporation, has read the bill of complaint herein, and understands the foregoing demurrer thereto, and that the same is not interposed for delay.

HENRY B. SARGENT.

Subscribed and sworn to this 10th day of March before me—
FRANCIS G. BEACH,
Notary Public.

I certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN K. BEACH,
Of Counsel for Defendants.

41 And on the 24th day of May, 1888, stipulation as to argument of demurrer was filed in the words and figures following, viz:

United States Circuit Court, District of Connecticut.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY. } Bill No. 586.

It is hereby stipulated and agreed that the above-entitled cause shall remain in its present condition, the demurrer filed therein to be argued at the time of the final hearing with the other cases

now pending between the same parties in this court or when called up by either party upon giving reasonable notice to the other.

May 18th, 1888.

BANNING & BANNING & PAYSON,
Solicitors for Complainants.
JOHN K. BEACH, *Solicitor for Defendants.*

42 And on the 18th day of October, 1889, consent and order appointing Samuel E. Hibben special examiner was filed in the words and figures following, viz:

43 Circuit Court of the United States, District of Connecticut.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY. } In Equity. No. 585.

It is hereby stipulated that Samuel E. Hibben may be appointed special examiner to take depositions at Chicago in the above-entitled cause, and the court is respectfully requested to enter an order to this effect.

October 12, 1889.

BANNING & BANNING & PAYSON,
Solicitors for Complainant.
JOHN K. BEACH, *Solicitor for Defendant.*

Appointed accordingly.

N. SHIPMAN,
District Judge.

And on the 30th day of December, 1889, complainant's evidence was filed in the words and figures following, viz:

44 Circuit Court of the United States, District of Connecticut.

JOHN F. WOLLENSAK
vs.
SARGENT & COMPANY. } No. 585. In Equity. Reissue No. 9307.

Complainant's Prima Facie Evidence.

To save the trouble and expense of taking evidence, it is hereby stipulated and agreed by the counsel for said parties, respectively, as follows:

1. Reissued letters patent of the United States, No. 9307, issued to the complainant July 20, 1880, being the patent sued on in this cause, may be considered as now formally offered in evidence by the complainant;

2. The transom-lifter marked "Sargent's transom-lifter No. 9307, November 29th, 1887, William H. Jacobus," used on the motion for a preliminary injunction in this cause, may be considered as now formally offered in evidence by the complainant;

3. The defendant's counsel admits that, prior to the filing of the

bill of complaint in this cause, the defendant, in the ordinary course of business, manufactured and sold said transom-lifter marked "Sargent's transom-lifter No. 9307, November 29th, 1887, William H. Jacobus," and others like it; and

4. That the affidavit of William S. Bates filed in this cause, on the motion for a preliminary injunction, may be read at the trial hereof as part of complainant's *prima facie* case, with the same force and effect as if taken as a formal deposition, pursuant to the 67th rule in equity, and may be printed as part of the complain-
45 ant's record; the defendant's counsel reserving the right to cross-examine said William S. Bates, in relation to said deposition, at some convenient opportunity during the presentation of the complainant's case in rebuttal.

April 29, 1889.

BANNING & BANNING & PAYSON,
Solicitors for Complainant.
JOHN K. BEACH, *Solicitor for Defendant.*

Mr. Bates' affidavit, above referred to, is as follows:

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss.*:

I, William S. Bates, of Chicago, Illinois, being duly sworn, upon oath depose and say as follows:

I have been for a number of years engaged as a solicitor of patents, and during that time have prepared and prosecuted applications for letters patent for a great variety of mechanical devices. During that time, and since, I have been frequently called upon to examine the specifications and drawings of letters patent, and to compare them with each other and with mechanical devices, for the purpose of determining questions of similarity and difference in construction and operation. I have been and am very often called upon to testify as an expert in patent cases, and have so testified a great many times—probably two hundred times in the last six or seven years.

I am very familiar with reissued letters patent of the United States No. 9307, issued to John F. Wollensak July 20, 1880, for an improvement in transom-lifters, having heretofore testified as an expert in a suit based thereon against one Frank A. Reiher. I have examined the transom-lifter marked "Sargent's Transom-lifter, No. 9307, November 29th, 1887, William H. Jacobus," referred to in the affidavit of William H. Jacobus, sworn to December 1, 1887,
46 before Timothy Griffith, U. S. commissioner; and I understand the construction and operation of said transom-lifter.

A simple inspection shows it to be clear beyond question that said Sargent's transom-lifter contains and embodies the invention described and claimed in the third claim of said reissued letters patent, No. 9307. This claim is for an upper guide G', arranged above the junction of the lifting arm and upright rod, in combination with a prolonged operating rod U, a lower guide G, and a lifting arm A,

connecting the transom sash to the upright rod; and all these parts are found in the Sargent transom-lifter, combined in the same way, and adapted to operate in the same way and for the same purpose. So there can be no doubt that said Sargent transom-lifter contains, embodies and applies the invention specified and claimed in the third claim of the Wollensak reissue No. 9307.

Although I have been familiar with this art for some seven years, during which I have testified as an expert in several cases relating to transom-lifters, I do not know and have never heard of anything existing before that more nearly approaches the specific construction specified and claimed in said third claim than the construction described in the fourth paragraph, beginning with the seventeenth line, of the specification of said reissued letters patent itself; and, from my familiarity with the art, I believe the combination specified in said third claim to have been new with Wollensak, and that the making thereof required the exercise of the inventive faculty, as distinguished from mechanical skill.

WILLIAM S. BATES.

Subscribed and sworn to before me, this 23rd day of December, A. D. 1887, as witness my hand and official seal as clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, the day and date last aforesaid.

[SEAL.] WM. H. BRADLEY, *Clerk.*

47 *Complainant's Evidence in Rebuttal.*

Proofs for final hearing taken on the part of the complainant at the office of Messrs. Banning & Banning & Payson, rooms 527-530, Temple Court, 225 Dearborn St., Chicago, Illinois, before Samuel E. Hibben, special examiner, pursuant to the 67th equity rule, as amended, on Tuesday, the fifth day of November, 1889, at 2 o'clock p. m.

Present: Mr. Ephriam Banning, for complainant, and Mr. John K. Beach, for defendant.

Counsel for complainant offers in evidence the following exhibits:

1. Certified copy of the file-wrapper and contents of the appeal to the examiners-in-chief taken June 16, 1880, in the matter of the reissue application of John F. Wollensak, filed September 17, 1878, for transom-lifter and lock, the same being the application on which reissue No. 9307 was granted.

2. Certified copy of disclaimer under said reissue No. 9307, filed November 20, 1886.

3. Copy of specification and drawings of letters patent of the United States No. 148,538, issued to complainant March 10, 1874.

4. Copy of letters patent of United States No. 196,851, issued to complainant November 6, 1877.

5. Copy of letters patent of the United States No. 278,759, issued to complainant June 5, 1883.

WILLIAM S. BATES, a witness produced, sworn and examined on the part of the complainant, deposes and testifies as follows, in answer to questions by Mr. BANNING:

Q. 1. State your name, age, residence and occupation.

A. William S. Bates; age, 38 years; residence, Chicago,
48 Illinois; occupation, solicitor of patents, and mechanical expert.

Q. 2. What experience have you had as a mechanical expert, and in connection with patents, and has your experience been such as to enable you readily to understand patent specifications, drawings and claims? If you have had any experience with transom-lifter patents, please state the same.

A. I have been engaged in mechanical studies and pursuits for over twenty years. During the last sixteen years I have been accustomed to prepare and prosecute applications for patents, also to examine specifications and drawings, and compare them with each other and with mechanical devices to determine wherein they resembled or differed. During the last twelve years I have been frequently called upon to testify as a mechanical expert in patent and other cases. My education and experience enable me readily to understand patent specifications, drawings and claims. I have testified in many cases on transom-lifters since 1880, and have examined a great many patents thereon, and a great many different kinds of transom-lifters.

Q. 3. Have you examined reissued letters patent of the United States No. 9307, sued on in this cause, and do you understand the same?

A. I have examined it, and understand it.

Q. 4. Have you examined a copy of the disclaimer, filed under said reissued letters patent, November 20, 1886, and do you understand it?

A. I have examined it, and understand it.

Q. 5. Please state the effect of such disclaimer.

A. The disclaimer disclaims the broad combination or invention described and also claimed in the first claim of the reissue No. 9307, and expressly limits said reissue to the second and third claims. It therefore limits the reissue to the specific construction shown
49 and described, notwithstanding any broad language there may be in the specification.

Q. 6. Have you examined the following patents introduced by the defendant, to wit: No. 81703, to Stickney and McGee, September 1, 1868; No. 85143, to Stickney and McGee, December 22, 1868; No. 79541, to Bayley and McCluskey, July 7, 1868; No. 93408, to F. E. Brown, August 10, 1869; No. 126,327, to G. W. Perry, April 30, 1872; No. 7998, to N. W. Speers, March 25, 1851, and do you understand them, respectively?

A. I have examined each of said patents, and understand them all.

Q. 7. Please state whether you find in any or all of said patents the invention described in reissue No. 9307, and claimed in the

third claim thereof, and give your reasons fully for any opinions you may express.

A. I do not. In order that my reasons may be understood, I will first explain the Wollensak invention, as shown and described in said reissue No. 9307, and claimed in the third claim.

Said reissue relates to transom-lifters and locks—that is, a device for lifting and supporting a transom window into an open or closed position, and locking it in the desired position. To this end, the device consists of an upright rod secured to a door-jamb in an upright position, so as to stand out therefrom, by three guides; a second rod, called the lifting-arm, is jointed to the upright rod and, also, to the bracket secured to the transom windows, so that a vertical movement of the upright rod, acting through the lifting-arm and the bracket, will open or close the transom window. The upright rod is prolonged above its junction with the lifting-arm, and this prolonged part passes through an eye or guide G′, which guides the rod in its motion, keeps it out of contact with the woodwork, and prevents it being bent or displaced. The lower
50 end of the rod passes through a similar guide G, which supports it and keeps it out of contact with the woodwork. Guide G is provided with a set-screw, which constitutes the lock, acting in conjunction with the upright rod, lifting-arm and bracket to lock the transom in any desired position. The third guide I have mentioned is located between the other two, and acts with them to support the rod to prevent its being bent or displaced by the weight of the transom, and to keep it out of contact with the woodwork. It is this structure or combination of elements which I have just described that constitutes the invention claimed in the third claim.

Referring now to the prior patents, I find that none of them contains the construction or combination of said third claim, and none of them contains anything which would suggest that construction to a mechanic. None of said patents even relates to the same subject of transom-lifters, probably for the reason that Wollensak was the first person who ever made a device for that purpose, and his reissue, 9307, is the first patent ever granted relating to that subject.

The Speers patent of 1851, No. 7998, is for a shutter-worker. A long screw is mounted in journals in a horizontal position, so as to be revolved when desired. A traveling nut moves along the screw when it is revolved. A connecting rod or pitman connects the nut with the window shutter. As the screw is revolved the nut travels and the shutter is swung upon its hinges. This device is not the transom-lifter, and bears no analogy to one. A shutter does not swing in the same way a transom does, and bears no weight upon its operating devices, as does a transom. The operating screw of the Speers patent is concealed in the woodwork or wall, which is impossible with a transom-lifter. A transom-lifter is secured to the surface of the woodwork, which is impossible with the Speers device. Speers has no upright rod and no sliding rod of any
51 kind. It has no eyes or guides, like the Wollensak, for sup-

porting a rod and guiding it in its motions. It has no bracket, it has no set-screw or similar locking device. In fact, it is different from the Wollensak, both as a whole and in all its details.

The Bayley and McCluskey patent of 1868, No. 79541, relates to car ventilators. These ventilators are small windows which swing laterally and open outward. The operating machanism consists of a pair of sliding bars connected with each window by connecting rods or links. A lever is pivoted between the sliding bars and is connected to them so as to move them when it is oscillated. The bars are arranged horizontally upon the inside of the car, and are held against the woodwork by straps which pass over them. This is not the Wollensak device. It could not even be applied to a transom in place of the Wollensak. Its sliding bars are held against the woodwork, whilst Wollensak's sliding rod is held away from the woodwork. The Bayley and McCluskey, being on the inside of the car, is applied to open windows outwardly. It could not be used to open windows inwardly. The Wollensak device is applied to open the transom inwardly, and toward the sliding rod, and cannot be made to open them outwardly, owing to the position it necessarily occupies away from the edge of the opening. There is no upright rod in the Bayley and McCluskey, no guides to hold the rods out of contact with the woodwork, no tendency to bend or displace the sliding bars by the weight of the windows, and no lifting arm, and no lifting or raising the weight or anything else; no lock, or no necessity for one, as the windows have no tendency to move from a position in which they are placed. I have here three models to illustrate what I have said about the Bayley and McCluskey, and I now produce them. One of them, a dark-colored model, represents the device as shown in the patent. The second one, a light-colored model, is exactly according to the patent, as far as it goes,
52 except that the windows are hinged so as to open inwardly, and shows that the device would not operate in that case. The third model shows parts of the Bayley and McCluskey as it would be applied to a door-jamb to operate a transom. It shows that it would not operate in that case. The models I have marked, respectively, "Bayley and McCluskey, Nos. 1, 2 and 3."

The Stickney and McGee patents of 1868, Nos. 81703 and 85143, are so nearly identical that they may be considered together. They both relate to car ventilators, and show windows pivoted at their middles so as to swing vertically. The windows are operated by a short rod, which slides in a socket and is connected to the windows by a slot and pin connection. There is no lifting-arm; no lifting is done; no weight is supported; and the device could not be applied to a window hinged at its top or bottom edge, for the reason that the weight of the window in that case would come upon the operating devices and they could not support it. There is only one guide for the rod and there is no locking device; there is a spring which causes friction between the rod and its guide, and simply increases the difficulty of operation. Comparing the Stickney and McGee with the Wollensak, we see that there is only one guide,

instead of three; there is no lifting-arm and no lock; therefore, several of Wollensak's elements are wanting.

The Brown patent of 1869, No. 93498, relates to a shutter-worker. The description is very meager and drawing still more so, and the drawing and description do not fit together very well. So far as appears, the device consists of a rod which extends across the window-frame, parallel with the sash, and a link or arm pivoted to the rod and also to an arm on the shutter-hinge, so that a longitudinal motion of the rod would swing the shutter. The shutter, of course, swings horizontally, and does not bear any weight upon any of the operating devices. It does not appear whether the rod moves
53 in guides at each side of the window-frame or not. It does at one side, where it passes through a socket. That socket is provided with a set-screw to lock the device. The Brown device has no upright rod, and has no lifting-arm, as there is no lifting to be done. It has no guides, like Wollensak's, which would hold a rod out of contact with the woodwork and at the same time guide it and prevent its being bent or displaced. Its manner of use is different from that of a transom-lifter, and there is nothing in the Brown patent to suggest the construction set forth and claimed by Wollensak.

I have before me a model which illustrates the Brown devices, as shown and described in the patent, which I here produce and mark "Brown Shutter-worker."

The Perry patent of 1872, No. 126,327, is for a car ventilator. The window is hinged at its middle, so as to swing vertically. A rod sticks up through the roof of the car, and its upper end is connected by a link to the lower edge of the window, so that a vertical movement of the rod will swing the window. This device could not be applied to a door-jamb so as to operate a transom, because it has no guides which would support it in such a position. Its only guide is the hole in the roof through which it extends. There is no guide of any kind above the junction of the vertical rod with the link which connects it with the window. The Perry device, therefore, lacks the Wollensak guides and set-screw, and the bracket on the window, and the prolongation of the rod above the connection with the link. It is operated under different circumstances, as there is no weight to be lifted or supported.

Counsel for complainant offers in evidence the four models referred to by the witness in his foregoing answer, and the same are marked, respectively, "Complainant's Exhibit Bayley and McCluskey Model No. 1," "Complainant's Exhibit Bayley and McCluskey Model No. 2," "Complainant's Exhibit Bayley and McCluskey Model No. 3," and "Complainant's Exhibit Brown, Shutter-worker."
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Adjourned to November 6, 1889, to 10 o'clock a. m.

November 6, 1889, said parties met pursuant to adjournment. Present, counsel as before.

Q. 8. Is the idea of lifting material in the Wollensak reissue, and

is there any difference between the operation of lifting a transom and opening or closing a window shutter?

A. The idea of lifting is material in the Wollensak reissue, hence the device is called a transom-lifter, not only in the patent but in the trade. The specification of the reissue all through lays stress upon the lifting and the effect of the weight of the transom. For example, in line 23, the specification says, "the upright rod is liable to be bent by the weight of the transom." It then proceeds to describe how this difficulty is remedied. There is a very material difference between lifting a transom and opening and closing a window shutter. The shutter, no matter how heavy it is, swings with comparative ease on its hinges, because the only resistance is friction. The transom, on the contrary, is almost invariably hinged at top or bottom, and hence has to be lifted bodily whenever it is opened or closed. Many transoms are very heavy indeed, and the lightest of them are heavy enough to require considerable force to lift them. The lifting devices have to be light and elegant, rather than heavy, both for appearance sake and also because they have to be lifted with the transom. With the transom the weight rests upon the lifting devices; whilst with the shutters the weight rests entirely on the hinges.

Q. 9. What is the first instance in mechanics that you know of in which a light, slender rod was used for the purpose of lifting or pushing up a heavy weight?

A. Wollensak's transom-lifter is the first instance that I
55 now recall. Wollensak's specification mentions previous existing transom-lifters, but there is nothing to show, either in said specification or in the other exhibits in this case, what those prior transom lifters were. They were probably some of Wollensak's own prior constructions.

Counsel for defendant objects to the last sentence of the above answer, as matter not being within the province of the expert.

Q. 10. Was the construction referred to in the statement or acknowledgement of the art, in the Wollensak specification, capable of being employed practically for the purpose of lifting a heavy weight?

A. I should say not. In fact, the Wollensak specification practically says not, in saying that the upright rod of such transom-lifters was liable to be bent by the weight of the transom.

Q. 11. Then, taking the prior patents offered by the defendant and the acknowledgement of the art in the Wollensak specification together, do you find anything sufficient to even suggest that the light, slender rod could be used for lifting a heavy weight, prior to the Wollensak invention?

A. I do not.

Q. 12. What is the first instance in mechanics that you know of, in which a set-screw was employed for the purpose of holding up a weight in any desired position?

A. I don't now think of any instance before the Wollensak transom-lifter.

Q. 13. Is the idea of locking, so as to hold the transom at any desired angle, material in the Wollensak reissue?

A. Decidedly so. The transom-lifter would have no practical value without a lock applied to it. If you had to get up and stick a boot-jack in it, you might as well open it by hand at once. It is also important that the lock should be a part of the lifter and where it can be reached.

Q. 14. Is the locking device an element or feature of the third claim of the Wollensak reissue?

56 A. I consider that it is, as it is a part, and an important one, of the lower guide and support G.

Question and answer objected to as introducing new matter.

Q. 15. What is the first instance that you know of, in mechanics, in which a guide or support was provided with a set-screw or locking device of any kind?

A. The Brown shutter-worker has a guide with a locking device; but that guide is not a support, such as Wollensak refers to in his reissue, and that locking device does not support a weight or anything else. I do not know of any such support and lock as Wollensak's, prior to his patent.

Q. 16. State, briefly, the elements or features of the third claim sued on, the characteristics or limitations of each element, and the functions of each.

A. The third claim is a specific combination claim. Its elements, including those expressed and implied, are (1) a transom window, arranged to swing vertically; (2) a bracket on said window, projecting outwardly and laterally therefrom to connect the window with its lifting devices; (3) a lifting-arm, hinged to said bracket; (4) an upright rod jointed to the lifting-arm, so that its vertical motion, acting through the lifting-arm and the bracket, will lift the transom, said rod being prolonged above its connection with the lifting-arm; (5) a guide and support G′ secured to the door-jamb, embracing the upright rod above its joint with the lifting-arm, and serving to guide it in its motion and to support it away from the wood-work; (6) a guide and support G, near the lower end of the upright rod, performing the same functions there that the guide G′ does in its place, and provided with a set-screw to lock the upright rod, and with it the transom, at any desired point and sustain its weight there; (7) a third guide and support, located between G and G′, and consti-

57 tuting the third point of support, mentioned in the specification, for the operating rod. All these elements, constructed and operating as I have stated, except the third guide, are absolutely necessary to the practical operation of the device; and I consider that they are all included in the language of the claim.

Q. 17. Do the words "guide" and "support," used in the Wollensak reissue, have the same meaning? In other words, is any kind of "guide" or any kind of "support" sufficient to meet the requirements of the third claim sued on?

A. The words "guide" and "support" refer to distinct functions of the devices G and G′. A slot in the wood-work would be a guide,

so would a strap like the Bayley and McCluskey, but neither of them is a "support" as the word is used by Wollensak. I do not consider that any kind of guide or any kind of support is within the patent. The patent is limited to its specific devices, to guide the rod and support it away from the wood-work.

Q. 18. Do you find this form of guide, or any particular form of guide, described in the acknowledgement of the prior art in the Wollensak reissue?

A. I do not. From that statement, it does not appear that any kinds of guides were used or how they could be used; but even if it did contemplate guides, they might be straps, like Bayley and McCluskey, but would hardly be supports at all.

Q. 19. What kind of locking device, if any, is referred to in the acknowledgement of the art in the Wollensak reissue?

A. It does not refer to any locking device. As a boot-jack or shingle were the only known forms of locking devices for transom-lifters at that date, they are, probably, the kinds contemplated, if any. They were the only kinds known to me, or shown by the exhibits in this case.

58 Q. 20. What kind of device is referred to in the acknowledgement of the art, in the Wollensak reissue, for connecting the upper end of the operating rod to the transom sash?

A. It is called a lifting-arm, and it is said to be connected to the side or edge of the sash. It might have been a pin, or the bracket shown in the reissue, in which case the whole transom-lifter would consist of this bracket and a rod, or broomstick, hanging down loosely from it. The description is not sufficient to show what was the construction or what were the functions of the device referred to. It is like saying that an animal with a tail existed. That does not describe bird, beast or fish, or even what kind of a tail it had.

Q. 21. Is any particular form of bracket for connecting the upper end of the operating rod to the transom sash shown in the Wollensak reissue; and what is necessary as to the bracket?

A. The bracket must extend outward from the plane of the sash, so that the force will be applied to the sash out of the line of the hinges. The bracket must also extend laterally beyond the edge of the opening for connection with the lifting-arm. This particular form of bracket is shown and described in the reissue.

Q. 22. Is it also necessary, for practical purposes, that the bracket be capable of use at either side of the transom; or, in other words, that it be reversible?

A. Certainly it is, as it may sometimes have to be applied one side and sometimes on the other; and it is so shown in the drawings of the reissue.

Q. 23. What is the first instance in mechanics that you know of in which an outwardly and laterally projecting bracket or reversible bracket, capable of being used at either side of the thing to which it is applied, was used for the purpose of connecting parts of machinery together?

59 A. For any such purpose as Wollensak uses it, his patent is the first instance I know of. For other purposes, how-

ever, brackets have been used, such as supporting a bearing or shaft.

Q. 24. Does the Bayley and McCluskey show a device capable of being employed to open a window inwardly—that is, toward the side at which the operating devices are placed?

A. It does not. The models, Bayley and McCluskey, Nos. 2 and 3, illustrate this fact.

Q. 25. What changes would have to be made if it were attempted to apply the Bayley and McCluskey device to the purposes of a transom-lifter, and is there anything in the patent to suggest such changes?

A. The bracket extending outwardly and laterally would have to be added, and the sliding bar would have to be moved away from the edge of the opening to leave space for the connecting link to operate. There is nothing in the Bayley and McCluskey patent to either suggest or warrant these changes. Another change which would have to be made would be to reduce the size of the bar to about one-sixteenth of its present weight, and to make it salable, it would have to be provided with supports to keep it away from the wood-work. These things are not suggested or warranted by the patent. The devices would have to be arranged vertically, instead of horizontally, and the lever I left off. As shown in the patent, the sliding bars are moved by a lever or separate handle, provided for that purpose. This would have to be removed, and the bar changed so as to be operated directly. None of these changes are suggested in the patent.

Q. 26. In their decision of Mr. Wollensak's appeal, in the matter of his application for the reissue sued on in this cause, the examiners-in-chief of the Patent Office, speaking of the Wollensak invention and the Bayley and McCluskey patent, say: "The one invention could never suggest or dominate the other, and, if made
60 by the same applicant, the office would undoubtedly be swift to require division and separate patents for the same. To construe Bayley and McCluskey patent as covering Wollensak's device now in dispute, would be to concede to them much broader claims than any set up by the latter." Is this in accordance with your view, and would it be at all correct if the Bayley and McCluskey patent anticipated the Wollensak invention?

A. I agree perfectly with the examiners-in-chief. Their view would not be correct if the Bayley and McCluskey anticipated Wollensak, for if it did there could be no ground for a division. A division is required only where there are two distinct patentable inventions.

Q. 27. Taking the patents introduced by the defendant, and the acknowledgement of the art in the Wollensak specification, or, in other words, taking everything shown in this case, as a starting point, do you or do you not consider that invention was involved in the making of the combination specified and claimed in the third claim sued on?

A. There was invention involved. The invention in question relates to an entirely new subject, one concerning which a great

many patents have since been granted, but concerning which nothing practical was previously done. The failure referred to in the specification, in speaking of some prior device, would rather discourage than encourage further efforts. Many of the parts or elements shown and described in the reissue are entirely new. Those which are not entirely new are of different form from anything shown in the prior art and are differently used. While the reissue, speaking of some previous abandoned experiment, may appear to say that the only thing added is the upper guide, the invention was really much more than this, and the reissue specification simply emphasizes this point. Though the device seems simple enough at this date, over sixteen years after it originated, when the art has been fully developed by subsequent efforts and study, it must
61 certainly at that time have required considerable study, thought and experiment, after the conception of the idea, to put the device in a shape in which it would be practically operative, and also a successful article of builders' hardware. It therefore must have required more than mere mechanical skill to produce it.

Q. 28. In view of all the limitations of the claim sued on which you have mentioned, or which can possibly be required by the prior art, do you find in the defendant's transom-lifter marked "Sargent's Transom-lifter No. 9307," the invention or combination specified and claimed therein?

A. I do, unquestionably. The Sargent device contains every part shown and described in the Wollensak reissue, and these parts, individually and collectively, are interchangeable with those of the Wollensak; and they are combined together and operate in the same manner as the combination called for by the claim sued on.

Cross-examination by JOHN K. BEACH:

X Q. 29. Your testimony has related to the third claim of the reissue, has it not?

A. Yes, sir.

X Q. 30. And you have stated substantially that, in your judgment, the broad language contained between the 32nd and 42nd lines of the specification thereof is not to be taken as affecting the meaning of the language of the third claim, have you not?

A. I have.

X Q. 31. This third claim describes a combination of specific elements, or their equivalents, having the construction described in the specification and shown in the drawings, does it not?

A. Yes, but it is limited to a very narrow range of equivalents.

62 X Q. 32. So that it is not by any means descriptive of a transom-lifter as a generic invention, is it?

A. No, sir.

X Q. 33. You have testified as to the specific elements which are necessary, in your judgment, to the operation of the transom-lifter described in the patent, and I understood you to state that you

regarded the third claim of the patent as comprehending some details of construction not specifically mentioned in the claim. Will you please enumerate by reference to the descriptive letters, or in any other convenient way, the several elements which you find are necessarily described in the third claim, leaving out all those things which you do not regard as being by necessary implication embodied in the combination stated?

A. The transom window T, the lifting-arm and bracket A, the upright rod U, the guide G', near the upper end; the guide G, including set-screw *s*, near the lower end; an intermediate guide, not lettered.

X Q. 34. Am I to understand that the intermediate guide is, in your judgment, a necessary element in the third claim?

A. It is, because the specification says the rod is supported at three points.

X Q. 35. Am I to understand the bracket, of which you speak, is a necessary element of the third claim?

A. Yes; the bracket is a part of the lifting-arm; so I infer from the specification, which says that the lifting-arm "connects the sash to the upright rod."

X Q. 36. You don't find the bracket described in the specification, do you, otherwise than by the words you have quoted?

A. No, sir.

X Q. 37. You don't find the intermediate guide, which you
63 have referred to as an essential element in the combination, described in the specification or shown in the drawings, do you?

A. Such a guide is shown, but it is not specifically described.

X Q. 38. You refer to the part marked R on the drawings?

A. Yes, sir.

X Q. 39. And it is your understanding that that part, marked R, is a guide substantially like those marked G and G'?

A. It may be, though in the form shown it is not. As it is not specifically described or referred to by letter, I understand that some latitude is allowable as to its form.

X Q. 40. Is it clear in your mind that the upright rod is intended to slide through the part marked R, as it slides through the guides marked G and G'?

A. It does not slide through R.

X Q. 41. Really, R is nothing but a friction-roller fastened to the lifting rod, is it not?

A. That is all.

X Q. 42. Now if you regard the roller R, and the bracket not lettered, and the transom window T, and the set-screw *s*, as being necessarily implied in the elements described and claimed in the third claim of the patent, then it is true, is it not, that by the same implications they are necessary elements of the second claim so far as they are not specified therein, and that the two guides G and G' are also elements of the second claim?

A. I have not considered the second claim at all, but on a cursory examination, I should say that the transom window and the brack-

ets were elements of it. I see no reason, though, for including the two guides G and G' and the set-screw.

X Q. 43. Is there not the same reason for including the guides G and G' in the second claim as that given by you for including an intermediate guide in the third claim, to wit, that the upright rod is described as being supported at three points?

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A. It may be, but it did not strike me that way.

X Q. 44. With regard to the form of guides, do you regard it as essential that the guides should be arranged so as to hold the lifting-rod at a distance from the jamb of the door, or is this matter of commercial advisability simply?

A. Both.

X Q. 45. That is to say, if the defendant's transom-lifter were arranged with its lifting-rod guided in contact with the jamb of the door, you would not then regard it as described by the third claim of the patent. Is that so?

A. I would not.

X Q. 46. Do you regard it of the essence of the third claim of the patent in suit, that it should be used in a vertical position?

A. Yes.

X Q. 47. So that if the defendant's transom-lifter were used horizontally, so as to open a transom swung sideways, it would not, then, be described by the language of the third claim of the patent in suit. Is that so?

A. It is, because it would then not be a transon-lifter.

X Q. 48. Is that the only reason?

A. Yes; I assume the devices to be otherwise identical.

X Q. 49. You stated that the Bayley and McCluskey device was not capable of opening a window inwardly, and referred to Bayley and McCluskey models Nos. 2 and 3, offered in evidence during your examination. Will you please examine the Bayley and McCluskey model No. 3 and state whether, if the window of that model were hinged at the other end, it could not be swung inwardly, without other alterations of the model?

A. I think it could, owing to the fact that it is a departure from the Bayley and McCluskey patent, and an approach to a transom-lifter in the arrangement and position of the sliding bar.

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X Q. 50. And would not the other model, Bayley and McCluskey No. 2, if the widows were hinged at the other end, and if the sliding bar were set out on something which corresponded to the jamb of a door or the casing of a window, in order that the jointed rod should have sufficient inclination to the plane of the window when shut, operate to swing the windows of the model inwardly?

A. It probably would operate to a limited extent, at least, in that case.

X Q. 50. If the window of the Bayley and McCloskey model No. 3 was hinged at the other end, the model would then illustrate a practical transom-lifter when turned into a vertical position, save only only some device should be added to lock the transom at any desired angle, would it not?

A. Yes; that is, it would operate, but probably it would not be salable.

X Q. 52. I understood you to say the Brown locking device does not support a weight. I presume you meant that such pressure as came upon it was a pressure of force acting in a horizontal direction as distinguished from forces acting in a vertical direction. Is that so?

A. Yes.

X Q. 53. Simply as a locking device, capable of resisting the movement of the operating rod, do you think it affects the function of the Wollensak locking device that the pressure resisted is one due to gravity rather than one due to horizontal pressure?

A. No.

X Q. 54. Isn't it true that the Speers patent for a shutter-worker possesses, in the traveling nut and screw, a well-known equivalent for the locking device of the Wollensak patent?

66 A. The Speers device is self-locking. It is hardly an equivalent for a set-screw, and does not operate in the same way.

X Q. Referring now to the statement of the prior art contained in the patent in suit, I understood you to say that it was not clear that any guides at all were used in the structure stated to have been previously used as a transom-lifter. Is that so?

A. Yes.

X Q. 56. Will you please look at the patent with special reference to the statements, first, that the sash was "opened or closed by a vertical movement of the long rod," and, second, that "when thus constructed the upright rod was liable to be bent, owing to the want of support at or near its point of junction between the long rod and the lifting arm," and say whether it isn't the fair meaning of that language that the long rod was guided in its vertical movement by some means which didn't adequately support its upper end?

A. Yes; and that would be true if this prior device consisted simply of the bracket on the sash, and a rod jointed to said bracket.

X Q. 57. You don't find that the use of guides *per se* is described as new in the patent in suit, do you?

A. No.

X Q. 58. Or that the use of guides, which serve to hold the upright rod out away from the wook-work, is new, do you?

A. No; the patent doesn't say whether they are or not.

X Q. 59. Or that the bracket is described as new in the patent, do you?

A. No.

Adjourned to November 7, 1889, at 10 o'clock a. m.

November 7, 1889, said parties met pursuant to adjournment. Present, as before.

X Q. 60. What do you mean when you say, in answer
67 to interrogatory 27, that the invention in question relates to an entirely new subject?

A. I mean that, so far as it appears from the art in this case, and

so far as I know, Wollensak was the pioneer and the originator of the art of transom-lifters, and not a mere improver in an art that previously existed.

X Q. 61. You do not mean, I suppose, to disturb by this language the effect of your testimony already given respecting the disclaimer, which is in evidence, do you?

A. Not at all.

X Q. 62. Do you say that many of the parts or elements described in the reissue are entirely new. Do you mean that they are new mechanical devices?

A. As new as mechanical devices ever are; that is, new in their present form and application.

X Q. 63. Excluding matters of form, will you point out the elements of the claim in controversy which you are willing to say have not been previously used in the art of operating ventilators or window-shutters?

A. Considered separately, they are probably all old, except the supporting-guides and the compound lifting-arm—that is, the arm and bracket.

X Q. 64. You have, also, in answer to X Q. 27, made use of language which would seem to indicate that you regarded the transom-lifter, described as old in the patent in suit, a "failure." The patent does not describe these prior transom-lifters as failures, does it?

A. It mentions them in connection with the defect in operation which would make them failures.

X Q. 65. Now, do you know whether they were practically used? I don't mean of your own knowledge, but from your familiarity with prior suits brought on this patent.

A. I do not know.

X Q. 66. Do you wish to be understood that this defect, or
68 lack of support at or near the upper end of the upright rod, would necessarily make such prior transom-lifters failures?

A. In practical use, it would.

X Q. 67. If it should appear, as a matter of fact, that transom-lifters without the upper guide and having this same defect of want of support have been and are now in practical use, would your opinion, that any such want of support necessarily involved a failure, be modified?

A. Of course, if I were mistaken, I would modify my opinion.

X Q. 68. In your answer to interrogatory 27, you say: "While the reissue, speaking of some previous abandoned experiment, may appear to say that the only thing added is the upper guide, the invention was really much more than this." You do not mean to be understood as saying that the reissue describes these previous structures as "abandoned experiments," do you?

A. No, the reissue does not say they are.

X Q. 69. If it should appear as a fact that, prior to Wollensak's invention, transom lifters had been constructed substantially like the transom-lifters shown in the drawings of the patent, save only that the upright rod is not prolonged above its junction with the lifting-arm, and that roller R is wanting, the upright rod being

guided by guides arranged below the junction with the lifting-arm, would your opinion as to the fundamental character of Mr. Wollensak's invention be modified?

A. Of course, if I should find I was mistaken in suppos- Wollensak to be the pioneer, I would cease to think him one.

Redirect examination by Mr. BANNING:

R. D. Q. 70. In such case, however, what would be your opinion as to his position with reference to the specific combination covered by the third claim sued on?

69 A. He might still be the first and original inventor of that combination, without being the pioneer in the art.

R. D. Q. 71. Referring to your answer to cross-question 69, do you consider that if, "prior to Wollensak's invention, transom-lifters had been constructed substantially like the transom-lifters shown in the drawings of the patent, save only that the upright rod is not prolonged above its junction with the lifting-arm," etc., as described in said question, they would have the effect of depriving Mr. Wollensak of the merit or credit of being the first to originate the transom-lifter in a practical form—that is, in a form capable of practical use, so as to confer practical benefits upon the public?

A. They would not.

R. D. Q. 72. I understand you to say, from your knowledge of this art, that transom-lifters constructed as described in cross-question 69, and in the acknowledgment of the art in the Wollensak specification, must necessarily have been unqualified failures if attempted to be applied to practical use in the usual or ordinary way. Am I correct in so understanding you?

A. Yes, for the simple reason that the upright rod would bend and mar the wood-work, and bind in its guides so that it could not be operated.

R. D. Q. 73. You have spoken of the middle guides as a necessary element, by implication, of the combination secured by the third claim sued on. Please consider this question again, and state how far you consider that it should be treated as an element of said claim.

A. I called it an element, because the specification says that the upright rod is supported at three points. As the claim refers to the rod by letter, the third guide might perhaps be included as an element, though not necessarily a material one in all cases.

70 R. D. Q. 74. Do you consider it to be an element to the same extent, for instance, that the set-screw is one?

A. No; because in some cases the transom may be perfectly operated without the third guide, but the set-screw is necessary in all cases. Besides this, the words "the guide G" in the claim include the set-screw, as it is an important part of that guide.

R. D. Q. 75. Then, if I understand you correctly, the middle guide may be treated as an element, and should be treated as one, if necessary to save the claim?

A. Yes.

R. D. Q. 76. In such case, what would be the difference between the second and third claims?

A. The second claim would be limited to the specific form of middle guide, with its roller R traveling with the rod—necessarily so on account of the language of the claim—while the third claim would not be limited to any specific form of middle guide, provided only that said guide would support the upright rod.

R. D. Q. 77. Referring to your answer to cross-question 42, do you find the two guides G and G′ mentioned, or in any way referred to in the second claim, and is there sufficient novelty in the second claim to support it without special reference to such guides?

A. They are not mentioned in the claim. There is sufficient novelty in the roller R to support that claim.

R. D. Q. 78. Referring to your answers to cross-questions 49–51, please state whether the windows of the Bayley and McCluskey model No. 1—the model representing the patent—could be opened inwardly if the changes as to hinging the windows, etc., suggested in those questions, were made?

A. They could not.

Recross-examination by Mr. JOHN K. BEACH:

71 R. X Q. 79. There would be no difficulty in hinging the windows last referred to, so that they could swing inwardly, would there?

A. Considered by themselves, apart from the operating devices, there would be none.

R. X Q. 80. And the operating devices are capable of swinging windows inwardly instead of outwardly, are they not?

A. If slightly modified, in the light of the Wollensak invention, they are.

R. X Q. 81. And not without modification?

A. I think not.

R. X Q. 82. The reasons which you give for your answer to R. D. Q. 72 are based on the assumption that the upright rod, therein referred to, is incapable of supporting the strain brought upon it without bending, are they not?

A. Yes, and it would be so if made of the usual size of material.

R. X Q. 83. Have you any knowledge of the size of material used before 1873?

A. No, sir.

R. X Q. 84. As I understand your theory of the third claim of the patent, it comprehends the intermediate guide, if necessary to save the claim, and does not comprehend the intermediate guide unless such necessity arises. Is that correct?

A. I meant that it might be construed into the claim or not at the option of the construer, but certainly should be construed into it if necessary to save the patent, which is clearly a meritorious one.

R. X Q. 85. Do you regard the roller R as the mechanical equivalent of the guide G′?

A. As a mere support, perhaps it is. As a guide, it is not. It could not be used in the place of G'.

R. X Q. 86. Then the specification does not say that the rod should be guided at three points, does it?

72 A. No; it says supported.

R. X Q. 87. When, therefore, you speak of the third claim as including an intermediate guide, you really mean that this intermediate device should be in the nature of a support, not in the nature of a guide, don't you?

A. Yes.

R. X Q. 88. Now, for the purpose of supporting the rod, I understand you to say that the guide G' is equivalent to the roller R. Is that correct?

A. It certainly would be, so far as concerns the third claim, if used in the proper place.

R. X Q. 89. So that the only difference between the second and third claims (the intermediate support being included in the third claim), is the substitution of one form of support for another and mechanically equivalent one. Is that so?

A. I can say yes and no to that. The devices would be mechanical equivalents so far as concerns the third claim, which is general in this respect, but not so far as concerns the second claim, which is specific. There are also other differences between the two claims.

R. X Q. 90. State them.

A. The third claim is specific as to the guides G and G'. The second claim, if it include them, is not specific as to them. The second claim requires that the roller R shall be arranged at the junction of the lifting-arm and the upright rod, whilst the third claim, if it include an intermediate guide, does not require that it be located at any specific point. The second claim requires that the roller travel with the rod, whilst in the third claim it may be stationary.

R. X Q. 91. Am I right in supposing that the only authority for construing the intermediate support into the third claim is

73 contained in the language of the specification, which states that the upright rod is supported at three points, and in the drawings which show a rod so supported?

A. Yes.

R. X Q. 92. You exclude from consideration the broad language between lines 32 and 42 of the specification in making this answer, do you not?

A. No, I do not.

R. X Q. 93. The specification, in stating that the rod is supported at three points, also specifically states that one of said points of support is "at the joint where it sustains the weight of the transom," does it not?

A. Yes.

R. X Q. 94. Now, if you use the statement that the rod is to be supported at three points as an authority for importing an intermediate support into the third claim, should you not also further

limit the claim by requiring that said support should be located at the point specifically mentioned in the specification?

A. No, because the patent indicates that that exact point is not necessary in the third claim, by making it necessary in the second.

Redirect examination by Mr. BANNING:

R. D. Q. 95. In speaking of the set-screw, intermediate support, and bracket connecting the lifting-arm to the transom sash, I have understood you to say that in so far as any of these parts are actually necessary to the operation of the device—in other words, actually necessary to an operative combination—they must necessarily be considered as positive features or elements of the third claim, the same as if specifically mentioned therein; but that, beyond this, they may be construed into the claim, if necessary to save it or omitted if not necessary to the question of novelty. Is this correct, and if so, how does it affect the third claim as to the three parts above named?

74 A. That is correct, I believe; though as to the bracket and set-screw, they are referred to in terms in the claim, the set-screw being a part of the guide G, and the bracket being a part of the lifting-arm A, which the specification says connects the sash to the upright rod. Even if none of these parts were mentioned in the claim, the set-screw and the bracket ought to be construed into it to make it cover an operative combination.

WM. S. BATES.

JOHN F. WOLLENSAK, the complainant, sworn and examined in his own behalf, deposes and testifies as follows, in answer to questions by Mr. Banning:

It is stipulated by counsel that the following part of the direct examination of John F. Wollensak, the complainant, taken July 25, 1881, before Elijah B. Sherman, master in chancery of the circuit court of the United States for the northern district of Illinois, in the suit against Frank A Reiher, under reissued letters patent No. 9307, which suit was carried to the Supreme Court, and is reported in 115 U. S., 87, may be copied into this record, and used as a part of the complainant's deposition in this cause, to wit:

Q. 1. State your name, age, occupation and place of residence.

A. My name is John F. Wollensak; I was born September 6th, 1846; occupation, manufacturer of hardware specialties; reside at 362 North La Salle street, Chicago.

Q. 2. Are you complainant in this cause?

A. I am.

Q. 3. Are you the inventor of the improvement in transom-lifters described and claimed in the reissued letters patent issued to you upon which this suit is brought?

A. I am, so far as I know.

75 Q. 4. Have you, in any way, heard of the use of such transom-lifters before the date of your invention, claimed in this patent?

A. I never did hear of any; in fact, I believe that I was the first man in the world that made a transom-lifter as described.

Q. 5. Are you engaged in manufacturing and selling these patent transom-lifters, and how long have you been so engaged?

A. It is my special business now, manufacturing these transom-lifters; I have been manufacturing them ever since the fall of 1872, for the benefit of the public.

Q. 6. State fully what efforts you made to introduce this invention to the public, either before or after the procuring of your patent.

A. Well, I introduced them by sending out circulars and models, and by advertising them in the trade papers, newspapers and by pamphlets, books, and so on. I sent men out on the road to introduce them. I put out a great many models, and consigned them to cities, and did everything else that suggested itself, with the view of introducing the goods and putting them on the market. I presume that I sent out as many as 500 models. That does not include the actual lifters that I sent out as samples which were sent out gratuitously. I spent a great deal of money in advertising; in some instances I paid as high as $300 for a single insertion in a catalogue. I do not know how much I spent, but it reaches far into the thousands of dollars. The goods are known all over this country and Canada, as well as foreign countries, to-day. The models ranged in price all the way from $3 up to $65 each. I have established agencies in all the principal points in the United States, and they are now carrying a stock of my transom-lifters. I have agents at New York, Philadelphia and St. Louis, besides head-
76 quarters in other large cities. By headquarters, I mean one house in each of these large cities that carry a stock of transom-lifters, and who get a special price, the object being to make it an object, or an inducement, for them to introduce the goods and push them.

Q. 7. Have you also a trade in foreign countries, in these transom-lifters?

A. Yes, sir. Some of the goods have been shipped to Australia, London, China, and the Hawaiian islands.

Q. 8. You say that you commenced the manufacture of these transom-lifters in 1872?

A. Yes.

Q. 9. Have you been constantly in that business since then?

A. Yes, that has been my principal business.

Q. 10. How much have you got invested in this business, approximately?

A. I should say at least twenty thousand dollars.

Q. 11. Have you been in a position all the time to supply all the demands of the trade?

A. I have always been in a position to supply all orders, ordinary orders, without delay. I never had any complaint as to delays.

Q. 12. Have you been in a position that you would have been able, constantly and promptly, to supply the demands of the trade if you had had the exclusive control of this business, so far as you know?

A. I have always been in a position, and am now, to make ten times as many as the trade called for.

Q. 13. How large is your trade at the present time, and is there a large demand for these goods?

A. The sales are now several hundred per week, and the demand seems to be increasing all the while; and the increase has been a steady one all the while since I commenced to make the transom-lifters.

77 Q. 14. State when you first conceived the idea of this invention, and what efforts you afterwards made to reduce it to a practical shape.

A. My first efforts were made in the spring of 1866. I then made a device that I cannot accurately describe just now, but, as near as I can remember, it was the same as that described as being old in my patents; and I applied it to a show-case door hinged at the top, that used to be in my room. Subsequently, and during the same year, I made a model door and transom, being in part made out of a cigar-box, the lifting device being made substantially the same as that described in my patent, but differing somewhat in the construction. Instead of passing the upper guide over the rod—that is, the lifting-rod—I slotted that portion of the rod and held the rod in place with a screw; the slot allowed the rod to pass up and down freely, the screw acting as a guide and support for the upper end of the lifting-rod; and, also, instead of a set-screw, as we use now, for the purpose of holding the transom in its position at any place desired, I also slotted the lower portion of the lifting-rod, and used a similar screw, as described, for the upper portion, for the purpose of holding the rod in place and guiding it, and drilled holes through the rod sidewise of the slot, and used a pin through the holes for the purpose of holding the rod in position—the rod being made square instead of round. I do not remember whether I used a chain at the time for holding the little pin from being misplaced or lost, or whether it was a cord—I believe it was one or the other—but, with this exception, the model was as near like the model I now have in my hand as I can remember. The model I now have in my hand was made July 22, 1881, from memory, and was made by me.

Q. 15. On what was your first device applied, before the making of your first model?

78 A. The room mentioned, wherein the first device was applied to a show-case, was then used by me as a museum where I kept all sorts of curiosities and relics, the show-case being used for such curiosities and relics. The show-case was originally made with sliding doors, and was reconstructed and changed so that the doors were hinged at the top, and this device was applied for the purpose of raising and lowering it, and holding it in position. These were my first efforts, although prior to that time I had many inquiries for something of that kind. This occurred to me then as being a good thing for the purpose of raising transoms, and the result was the making of a model in the same year.

Q. 16. The first device applied to a show-case did not have any upper guide?

A. As near as I can remember, it did not, being made of wood almost wholly.

Q. 17. Do you remember when you first started that museum to which you have referred, and how long you kept it up?

A. I started the museum about the middle of May, 1866. I took the room the first of May, but it was along about the middle before I moved in and fitted it up. The museum was abandoned when father moved away from that house. What I mean by abandoned is, that the contents of the museum were moved when father moved, and were stored, and it was never put on exhibition or the museum kept up after that, but was moved several times from house to house, and was finally burned up in the great fire. I think I have a few of the contents of the museum left yet, such as shells, and there may be a few old books. I do not remember just what there is left, but I have a few pieces left.

Q. 18. With whom were you living at that time, and where?

A. I was living with my father on White street, at the corner of Sedgwick street, in this city.

79 Q. 19. Do you remember when your father moved to that house, and how long he remained there?

A. He moved there in May, 1865, and I remained there two years.

Q. 20. How do you know he was living there in 1865?

A. I locate the date in this way: That my sister Emma was born a few days after we moved in that house, and she was sixteen years old last May.

Q. 21. Are you certain that you made that model while living at that house?

A. Yes.

Q. 22. Are you certain also that you never kept up that museum or had such museum after you left that house?

A. I am certain that the museum was abandoned when we moved away from that house, in the way I have stated.

Q. 23. State when you first went into business for yourself, and with whom.

A. I went into business in the spring of 1867—it was in April, as near as I can remember, or find out—with Samuel Salzer, of this city. He furnished the money, and his brother acted in his place; we were then at locksmithing and repairing, at 120 E. Randolph street.

Q. 24. Did you make the model referred to before the formation of that partnership?

A. Yes. Mr. Salzer and myself bought the business of my father, and it was my intention to have the thing patented at that time, and to manufacture the transom-lifters; but subsequently I concluded that my acting partner was not a suitable man for me to continue in business with indefinitely. That was one reason why I did not apply for a patent at that time, although I was informed that I could not obtain a patent until I became of age.

Q. 25. How did you come to be so informed, and by whom, if you recollect?

A. I do not recollect by whom it was, but if my memory
80 serves me right, it was by some party on Dearborn street, near Randolph, upstairs. I was fitting a key to his desk, and I saw he was a lawyer, and I asked him whether he did that kind of business, and he said he did; and I was then informed that I could not get a patent until I became of age.

Q. 26. How did you come to speak about the matter?

A. I was at that time thinking about getting out a patent, and it was on my mind. This was after the model was made.

Q. 27. What did you afterwards do with that model; what became of it?

A. Well, the model was made by me secretly; no one knew about it, and it was hidden in the shop, and was burned up in the fire of 1871.

Q. 28. Did you ever show it to any one, or tell any one about it?

A. I did not.

Q. 29. This model, made from part of a cigar-box, which you have produced here is as nearly like the one made in 1866 as it is possible to make it from recollection, with the exceptions named in one of your previous answers, as I understand you?

A. Yes, sir.

Q. 30. When did you first meet Mr. Ellsworth, who solicited your patent?

A. The firm name was Hill & Ellsworth, or Ellsworth & Spear, I have forgotten which. I first met Mr. Ellsworth in March, 1870.

Q. 31. Did you have your model, and did you contemplate applying for a patent at that time?

A. I had the model at that time, and remember the circumstance in this way: I was called as a witness in an interference case, and,
Mr. Ellsworth being one of the counsel in that case, I rather
81 liked his appearance and manner of conducting the case, and concluded then to try and get him as soon as I was ready to apply for a patent.

Q. 32. When did you talk with Ellsworth about applying for a patent?

A. It was some time in the summer or early in the spring of 1872.

Q. 33. Why did you not sooner apply for a patent?

A. I have stated that my partner, at the time of making this model, was not a suitable man to continue with, and I believed that if I applied for a patent at that time that he would, by the terms of our agreement, become part owner. After we dissolved, which was in the spring of 1869, I was short of funds, on account of having to buy him out, and not long after that the fire came along and burned up everything I had. After the fire, I took another partner, and soon learned that he was not a suitable man for me, and for these reasons did not deem it wise to apply for a patent earlier. But immediately, almost, on the dissolution of my second partnership, I made preparations to and did apply for a patent.

At the time of our purchase from my father, we were doing small

business in repairing and key-fitting, and our income was, of course, in proportion. I did not have the heart myself to push very rapidly, in view of the decrease of the trade, for the reasons I have stated, on account of the incompetency of my (acting) partner, so we dragged along very slowly, and it was nip and tuck to pay the bills, especially on my part, to pay father my half portion. After the dissolution with Salzer, the business was in a very little better condition than when we took it, and I saw that some necessary improvements had to be made, and I made them. This involved considerable outlay, and that, together with what I had to pay Salzer for his interest, left me short of funds always up to the time of the fire. I was just then about getting through with the im-
82 provements when the fire came along. After the fire I was very short of funds and I took in a partner again who had some money, and continued with him about two years, but we could not agree, and it was not until I dissolved with him that I felt able to and willing to go on and manufacture this device.

Counsel for complainant now offers in evidence the cigar-box model referred to by the witness, and marks the same "Complainant's Exhibit Wollensak 1st Model."

And in answer to further questions, said witness now deposes and testifies as follows:

Q. 34. Have you been engaged in the manufacture and sale of transom-lifters ever since you began the business, as stated in your foregoing deposition, and what is the condition of the business now, as compared with its condition at the time you gave that deposition, in 1881?

A. I have been continually in the business since I commenced, and the business has grown since my 1881 deposition to about four times its then volume.

Q. 35. State, briefly, what difficulties you had to contend with in making the transom-lifter described in your reissue No. 9307, and how much time, effort and experimenting you were required to expend before finally getting it in perfected shape.

A. It is difficult for me to state the time it took, as it occupied nearly all my spare time, and I am still learning that there are cases that require modifications to make the lifter adaptable to the various situations; required constant study, making models, patterns, throwing them away and starting over again, and I have not got through yet.

Q. 36. But I mean, particularly, as to your early work or efforts—before you applied for your first patent.

A. The difficulties were that I was lacking of funds, for one. I commenced business when I was quite young; not having
83 any money, I borrowed what I did have to invest in the business; and I had two partners prior to that time that I could not agree with, and held back applying for a patent on account of that. The difficulties that I ran against in making my first models, in experimenting, were in providing against the transom that was heavy, in lifting it, and arranging the rod so as to be held out from

the wood-work, and so as to make proper connection with the transom. All these things had to be studied, which took time and experimenting.

Q. 37. Was it clear, from all the knowledge you had on the subject, whether a light, slender rod could be used practically for the purpose of lifting the weight of a transom, or was experiment necessary to determine this?

A. I had no basis to start out with. I had everything to learn. I hardly know myself how I finally got it into a perfect state. It came by degrees.

Q. 38. After you were satisfied that a rod could be used for lifting the transom, what had to be done in reference to the position and operation of this rod—I mean as to supporting or guiding it?

A. I had to provide guides at proper points to support the rod and prevent the rod from being bent by the weight of the transom. I had to provide suitable means for holding the transom in position when opened or closed, or in any position, so that the rod could be placed at any desirable point on the casing, and held out from the wood-work so as not to mar the wood in its movement, and altogether make it as light as possible and neat in appearance, so as to make it a salable article, and still have it strong enough to answer the purpose.

Q. 39. What did you have to do in reference to providing means for holding the transom open at any angle desired, and what suggested the means employed by you for this purpose?

84 A. On the very first model I made. I employed a pin which entered through the rod and rested on the lower guide. When the pin was out the rod would move up and down freely, and when the pin was in the rod could be held up or down, as desired, and locked in that position; but I soon found that that was not very neat in appearance, certainly not ornamental, besides it had a tendency to weaken the rod on account of having to drill holes for the pin. This made the rod liable to be broken off, particularly when the transom was closed; the lower free end of the rod projecting below the lower guide made it easy to break the rod at one of the holes. That suggested the set-screw and also doing away with having to drill the rod for the pin. This change made the rod strong where it was weak, and gave the lower guide a neat appearance.

Q. 40. Had you ever before that time seen or heard of a guide with a set-screw in it?

A. I cannot recall any just now. The nearest I can get to it is a set-screw sometimes used on a compass in connection with a curved bar.

Q. 41. But, in that case, the set-screw and guide were not used for any such purpose as in your transom-lifters, were they?

A. There were no transom-lifters in those days.

Q. 42. But I mean for any such purpose as they are now used in connection with transom-lifters?

A. I have no recollection of any set-screw being used to hold a rod moving as a transom-lifter does, for the purpose of holding a transom open in any position, locked or partly open.

Q. 43. What was the first instance you ever knew of where a set-screw was used for the purpose of supporting or holding up a weight of any kind?

A. Do not think I ever saw one before I applied it to a transom-lifter.

85 Q. 44. Would your transom-lifter be practical or capable of use without a locking device to hold the transom?

A. It would not. The transom could not be held open or closed without some kind of locking device.

Q. 45. Then is this locking device a material feature of your invention?

A. It is certainly indispensable to a transom-lifter.

Q. 46. How heavy are transoms sometimes made—that is, what weight does the operating rod have to lift and the set-screw hold up?

A. Transoms will sometimes weigh as much as 500 pounds. For heavy transoms two lifters are usually employed—one on each side, and, if the transom is very heavy, sometimes it takes two men to raise and lower it. The lifter must be strong enough to sustain this weight, and the weight brought to bear so as to make the lifter work as easily as possible.

Q. 47. How large can a transom be and still be capable of being raised and lowered by a single lifter?

A. I draw the line at 150 pounds.

Q. 48. With this weight, or the weight of an average transom, is the operating rod liable to bend and cramp or bind in its guides?

A. Not if a suitable size be used.

Q. 49. How would this be if less than three guides or supports were used, as shown in your patent sued on?

A. A transom weighing 150 pounds, or less weight than that, having a lifter with only two guides, one at the top and the other at the bottom, would certainly bend the road against the wood-work and cramp in the guides.

Q. 50. What would be the effect if their was no guide above the junction of the lifting-arm with the operating rod?

A. It would be, that in lifting the weight the upper end of the rod would bend in or out, according to how the transom was

86 hinged, and if hinged in some ways would be absolutely dangerous—that is to say, the weight of a transom could not be sustained by the lifter, unless it were made in a size out of proportion, and then the cramping in the guides would still remain, which makes the rod move up and down hard.

Q. 51. From your experience and familiarity with the operation of these devices, what can you say as to the practicability of a transom-lifter, say, like the one shown in your reissue sued on, except that it has no guide above the junction of the operating rod with the lifting-arm?

A. It is the kind of device I had in my mind in answering the last question.

Q. 52. Would it be practical, or not?

A. It would not be practical. It would be a transom-lifter only in name. In my opinion, such device would scarcely find a

market. In some special cases it might be used, as where a transom is hinged at the top or on pivots; but all these difficulties would have to be put up with, such as the bending of the rod, the wearing away of the door-frame by the upper end of the rod, and the sliding of it laterally. In a case where a transom was hinged at the bottom, and had some weight to it, the lifter would not sustain the weight, and the transom would come down if it were attempted to hold it up with such a lifter.

Q. 53. Do you mean, then, that if attempted to be used in the usual and ordinary way, say as your lifter is used, it would necessarily prove a failure?

Objected to as leading.

A. It would. If such a device were practical, it seems to me that Sargent & Company and others would make it, instead of copying my device literally. I presume that they have tried. I know I have tried, and found this device not practical.

Q. 54. Is such transom-lifter, without a guide above the
87 operating rod, now in the market, or has it ever been in the market?

A. Yes, there were two such devices in the market. One is still in the market; the other has been abandoned. One is the Arthur English patent of December 1, 1885, No. 331,289. The other is the Charles Steller patent of May 5, 1885, No. 317,036, made by the Russell & Erwin Manufacturing Company.

Q. 55. Please describe these lifters referred to in your last answer.

A. They are similar to the patent in suit, but without a guide above the junction of the lifting-arm, and having a different locking device.

Q. 56. Then, if the transom-lifter, without an upper guide, would not operate practically, how is it that these find a place in the market; do they have anything else to take the place of the upper guide?

A. They have nothing to take the place of the upper guide that I know of, and Mr. English only carried on his business a few months, and the Steller lifter, as made by the Russell & Erwin Company, at most, have a very limited sale, as I never hear of them in the market now. At one time I did hear of them frequently, but they were generally from houses that were not familiar with the lifter business. I believe that they have practically stopped making it for want of trade in them.

Q. 57. When did these two forms, that you speak of, come on to the market, before or after your introduction of the transom-lifter?

A. About twelve years after I introduced mine on the maket.

Counsel for complainant offers in evidence the Arthur English patent of December 1, 1885, No. 331,289, and the Charles Steller patent of May 5, 1885, No. 317,036, referred to by the witness in his foregoing answers.

88 Q. 58. You have referred, off the record, to the fact that children would sometimes unscrew the set-screw, etc. What did you do, if anything, to overcome this objection?

A. I found that set-screws were being lost to such an extent that it became a source of annoyance to me and my customers and a source of expense to me—they would sometimes get lost in shipping. I then got up an improved set-screw, which I now use, as shown in my transom-lifter introduced in this case, which I patented June 5, 1883, No. 278,759.

Q. 59. Did the improvement described in your first patent fully meet all the requirements as to the lifting of the transom, etc.?

A. It did.

Q. 60. Did it meet these requirements in all cases or only generally? In other words, did you have to make other improvements afterwards to meet the requirements of particular cases?

A. My 1873 patent was especially designed for a transom hung at the top or balanced on pivots. I found that while this lifter would operate a transom hinged at the bottom, the prolonged rod was in some cases an objection; as in the case where a transom was near the ceiling, it necessitated boring a hole through the ceiling, and in some cases the prolonged rod would come through the next room above. That feature suggested the 1874 patent, having the long stationary guide. Then I found a transom hinged at the bottom was liable to fall if the set-screw was unlocked—was opened suddenly without holding the rod—so that the transom was liable to fall onto solid bearings, and there was danger of the bearings being broken off. To obviate this I introduced a spring onto the long guide to receive the shock of the falling transom, to prevent the bearing from being broken and the transom from falling down.

89 These are some of the difficulties I met with. Others I have provided for from time to time by improvements, for which I have secured letters patent.

Q. 61. You have spoken about having to provide for special difficulties even at the present time. What do you mean by this?

A. Special cases are frequent. Sometimes the transom bar will project several inches in from the frame. I have found cases where holes had to be bored through this bar, and the objections to our regular device were that the hole would have to be so large as to make it objectionable. For this purpose I make a joint-coupling—that is, the part to which the arm is joined is coupled by a screw-thread to the operating rod—prolonged rod—so that it can be taken apart, and a small hole can be bored through the moulding, and the parts fitted together after that. Then, there are cases where the skylight lifter is used for transoms, which require a different connecting part where it connects with the transom. These are the things that suggest themselves to my mind at this time.

Q. 62. When a special case of this kind arises, what is done at your office?

A. They are invariably referred to me. I then direct or make the order myself, and show by drawings and otherwise what is required.

Q. 63. How are transoms generally hung?

A. Transoms are generally hung at the top, and swing in.

Q. 64. Who first gave to the art or trade the name "transom-lifter?"

A. I did. I not alone was the first to introduce a transom-lifter, but originated the name "transom-lifter" as well. Such a name as "transom-lifter" was unknown prior to the time that I first introduced my transom-lifters. I introduced the name to the public by illustrations of the transom-lifter, and directions how to put it up, and explanations explaining what a transom-lifter was.

90 Q. 65. What relations have existed between you and the defendant in regard to transom-lifters?

A. They bought my transom-lifters for several years, up to the time they commenced making the lifter that was the same as my 1873 patent, and another one similar to the 1874 patent. It was the same substantially, except that it had not the spring.

Q. 66. Did they also advertise your transom-lifter in their catalogues?

A. They did, in their catalogues of 1880 and 1884.

Q. 67. Did you pay them for such advertisements?

A. I did.

Q. 68. How much?

A. Altogether, $500, I believe.

Q. 69. Have you any letters or telegrams here present from Sargent & Company in reference to your advertising your transom-lifters in their catalogues? If so, please produce the same.

A. I have three letters and one telegram, which I here produce.

Counsel for complainant offers the letters and telegram produced by the witness in evidence, and the same are marked, respectively, "Complainant's Exhibit Sargent Letter No. 1," "Complainant's Exhibit Sargent Letter No. 2," and "Complainant's Exhibit Sargent Letter No. 3" (this including letter of April 10, 1884, and telegram of April 21, 1884.)

Q. 70. Have you a copy of defendant's catalouges, in which your advertisements were published? If so, please produce the same.

A. I have such catalogues, published by Sargent & Company in 1880 and 1884, and here produce them.

Counsel for complainant offers in evidence said catalogues,
91 but their production at the hearing is waived, it being admitted by counsel for defendant that on page 783 of the catalogue of 1880 and page 680 of the catalogue of 1884 they contain the following, with price list appended thereto, to wit: (See opposite page.)

(Here follows diagram marked p. 91½.)

Cross-examination by Mr. BEACH:

X Q. 70*a*. I understand that the first model of any sort of transom-lifter which you made was made in 1866, and applied to a

window of a show-case, and that it did not have any prolongation of the upright rod beyond its junction with a lifting-arm. Is that correct?

A. I guess it is.

X Q. 70b. And that during the same year you made another model, in which the upright rod was prolonged beyond its junction with the lifting-arm. Is that correct?

A. Correct.

X Q. 70c. This first model that you made was actually used by you in connection with the window of this museum, was it not?

A. I did not consider the show-case device a model, but simply a make-shift arrangement to lift the show-case door, and it suggested the idea of applying it to a transom. I did not regard it as a model. The idea of applying it to a transom did not occur to me until after it was put onto a show-case. Aside of that, the description you give is substantially correct. My memory is so vague in regard to the device that was on the show-case that I would not undertake to say now whether it did work or not. It suggested the device that I put onto the cigar-box.

X Q. 71. How long after the suggestion occurred to you did you make this cigar-box model?

A. It was during the same year, I believe.

X Q. 72. Then this cigar-box model was kept secret and not shown to anybody, and was finally destroyed in the fire of 1871?

A. Yes, sir.

92 X Q. 73. How long was it after the fire of 1871 that you made any other transom-lifter?

A. I think it was in 1872.

X Q. 74. I do not understand this 1866 model contained all the points of convenience and utility, which are shown in your patent in suit. Did it?

A. No, sir; it was not so perfect as this patent you refer to.

X Q. 75. At the date of your patent in suit, a collar or set-screw was a well-known clamping device, was it not?

A. I cannot say as to that. The only other use I can connect with it now is the compass I already described.

X Q. 76. Well, between 1866 and 1872, I do not understand that you made any models or experiments regarding models in the line of transom-lifters. Is that correct?

A. That is substantially correct.

It is stipulated that the following part of the cross-examination of Mr. Wollensak, in his deposition in the Reiher case above referred to, may be copied into this record and treated as a part of the present cross-examination.

X Q. 77. Did you or not put up, after the fire, transom-lifters without the extension of the operating rod above the juncture of the operating rod with the lifting arm?

A. I presume that we did.

X Q. 78. Do you know whether you did or not?

A. Yes, sir.

X Q. 79. How many of that kind did you put up after the fire?

A. I do not remember.

X Q. 80. A considerable number?

A. Perhaps, ever since then, 100.

X Q. 81. Did you manufacture that kind at your shop and put them up right after the fire?

A. Right after dissolving with my second partner.

93 X Q. 82. Who was he?

A. John Sinkle.

X Q. 83. When did you dissolve with him?

A. I think it was in the spring of 1872.

X Q. 84. Can you tell where you put up any of these transom-lifters which were constructed without the extension above the juncture of the lifting arm with the operating rod?

A. I did not put any up myself. I always had my men do it.

X Q. 85. I do not mean individually, but where did your men do it?

A. I do not remember any particular place; we make them today.

X Q. 86. Tell what building they were put in, if you remember.

A. I do not know as I remember what building they were put in—yes, I can—we put them in the Metropolitan block, at the northwest corner of La Salle and Randolph streets. We put them in the basement; it was a place where the transoms were very narrow and vertical, and they were suspended directly from the ceiling.

X Q. 87. Did you put up but the one kind at that time?

A. I think we put up some in the upper floors, but used a device with guides above the point of junction.

X Q. 88. Was there any other buildings that you remember putting them in?

A. I cannot remember any other now.

X Q. 89. Are they there now?

A. I do not know, but I presume so.

X Q. 90. Are you certain that they were put up in a place where the transom was narrow and was hinged at the top?

A. That was the way it was.

94 X Q. 91. Are you sure that all those put up were transoms of that kind?

A. To the best of my memory.

X Q. 92. Did you examine them after they were put up?

A. No.

X Q. 93. Did you examine the place where they were to be put up to see what kind of transoms were to be used?

A. No.

X Q. 94. You simply knew they wanted transoms there and sent these?

A. I presume there was a regular order brought for them, with a sketch of it, or it is possible that I sent a man down there to measure them and get the particulars.

X Q. 95. Did you ever put up any of that kind before the fire?

A. The only two that I made were, as stated, before the fire.
X Q. 96. What two were they?
A. The one model and the show-case.

JOHN F. WOLLENSAK.

WILLIAM J. WILKES, a witness produced, sworn, and examined on the part of the complainant, deposes and testifies as follows, in answer to questions by Mr. BANNING:

Q. 1. State your name, age, residence and occupation.
A. William J. Wilkes; age, 44 years; residence, Chicago, Illinois; occupation, superintendent for Jno. F. Wollensak.
Q. 2. In your position as superintendent for Mr. Wollensak, do you have any occasion to know particularly about his transom-lifter business?
A. Yes, sir; I have the charge of making them.
95 Q. 3. How long have you been connected with the business as foreman?
A. Four years and a half
Q. 4. Were you connected with it in any other capacity before that time?
A. No, not with the transom-lifter business.
Q. 5. Are any difficulties met with in the manufacture and use of transom-lifters at the present time?
A. Well, there are considerable difficulties in the way in different situations, such as different shaped frames, mouldings and different recesses for transoms, and a place where a transom is in a frame by itself—that is, not over the door.
Q. 6. What is done whenever a difficulty of this kind is met with?
A. Well, the thing, if it is very complicated, we got to have a plan of the frame, probably a side and front elevation—that is, to get at the situation. Then, possibly, there has to be drawings of the lifter in different positions and drawings of the patterns to make the parts. We have no end of trouble in adapting it to the different situations, especially where they are complicated.
Q. 7. From your practical experience, state whether a transom-lifter rubbing directly against the door-jamb would be practical or not.
A. Well, I do not consider it would be practical, but it would work.
Q. 8. Would a transom-lifter, without a prolonged operating rod, and without a guide above the junction of the operating rod with the lifting arm, be practical or not?
A. If the transom was hinged at the top it would have a tendency to push the rod inwards and rub against the casing. If it was hinged at the bottom, it would have a tendency to bend the rod outwards, or probably drop the transom from its weight. It would be rather dangerous, and so I would hardly consider it practical.
96 Q. 9. How large are transoms sometimes made?
A. Well, they run, I should judge, as high as five or six

hundred pounds. They are sometimes made 9 x 15 feet. We have some here in the city that are that size.

Q. 10. In operation, is the weight of one of these heavy transoms lifted by the operating rod?

A. Well, yes; it is lifted by the operating rod through the lifting arm.

Q. 11. Then the weight has to be borne and carried upward by the operating rod?

A. Yes, sir.

Q. 12. And when the transom is locked open at an angle, what holds up the weight?

A. Well, the locking device or set-screw holds the weight.

Q. 13. Is it necessary that the bracket, used to connect the lifting arm to the transom sash, be made reversible, so that it may be used at either side of the sash?

A. Yes, that is very necessary.

Cross-examination by Mr. BEACH:

X Q. 14. These extra-heavy transoms are always hung on pivots, so as to be pretty nearly balanced, are they not?

A. They are not, in all cases. Some of these very heavy ones are hinged at the top.

X Q. 15. And for those you make extra-heavy lifters, do you not?

A. Yes, sir.

Redirect examination by Mr. BANNING:

R. D. Q. 16. How are transoms generally hung?

A. Well, they are generally hinged at the center and top. I think they are mostly hung at the center, but I am not sure about that.

WILLIAM J. WILKES.

97 It appearing somewhere in the record that the construction disclaimed in the acknowledgement of the art in the Wollensak specification was at one time used in the room occupied by the examiners-in-chief of the Patent Office, counsel for complainant now offers, notwithstanding the defendant's evidence has been long since closed, to permit the taking of the deposition of any one or more of said examiners-in-chief to show any facts which they may know in reference to their construction and operation, provided that the same be taken speedily, so as not to delay the hearing.

Defendant's counsel states that he was not aware that such apparatus was used at Washington, but, notwithstanding the offer of complainant's counsel, he will respectfully decline to go to the expense of taking the depositions of either of the gentlemen referred to, in order to prove a fact which seems now to be admitted.

It is stipulated by counsel that the following depositions of Smith M. Randolph, John Addison, John Middleton, W. L. B. Jenney, E. S. Jennison, John J. Sherman, Matthew B. Sweezy, Theodore B.

Wadskier, Otis L. Wheelock, R. L. North, Oswald Locket, Frederick Bauman, A. Lucas Hunt, George E. Bliss, G. S. Standart, B. F. Homer, Richard Pennington, James M. Horton and Amos Grannis, taken in December, 1880, before Elijah B. Sherman, master in chancery of the U. S. circuit court for the northern district of Illinois, in the suit against Frank A. Reiher, above referred to, may be copied into this record and used with the same force and effect as if now retaken herein; but the counsel for the defendant in this cause is not to be in any way understood as accepting or
98 adopting the cross-examination of any of said witnesses, and thus making the same his own cross-examination. Said depositions are as follows:

SMITH M. RANDOLPH, being first duly sworn, testified as follows:

Q. 1. What is your name, age, residence and occupation?

A. My name is Smith M. Randolph; I reside at 275 West Van Buren St., and I am by occupation an architect.

Q. 2. How long have you been engaged in the profession of an architect?

A. For twenty years. I was in the army three years and am now forty-three, so that I have been at it most of my life.

Q. 3. Are you acquainted with John F. Wollensak, the complainant in this case?

A. Yes.

Q. 4. How long have you known him?

A. Since 1871; I have known him about eight or nine years.

Q. 5. Do you know whether or not he is a dealer in what are known as transom-lifters?

A. He is a dealer in hardware specialties—specialties of that kind.

Q. 6. Do you know what these transom-lifters are, as to construction and operation?

A. I have used them in my business seven or eight years.

Q. 7. Prior to the time you began to use them, seven or eight years ago, what transom-lifters were in the market?

A. I never saw any.

Q. 8. Then, the first transom-lifter you ever saw was Wollensak's; it was the first one you ever saw?

A. It is the only one I have ever seen.

Q. 9. State whether or not Wollensak first called your attention to it.

99 A. I am inclined to think that one of his agents came to my office with drawings or a model of it. I can't say how I first became acquainted with it, but I think it was first brought to the office, as such things are usually brought to the attention of architects.

Q. 10. State whether or not, after your attention was called to it, you adopted it and used it.

A. I did.

Q. 11. Will you state whether or not it possesses any special merit? If so, what?

A. I think it is an article of great merit; I don't know how we could get along very well without it. I have seen no other transom-lifter, except the cord, or something of that kind; no lifter and lock combined.

Q. 12. Will you state, judging from your experience in the matter, whether or not, in your opinion, Wollensak was the creator of the art of operating transoms by devices of this character?

Objected to.

A. So far as I know, he is the only individual that ever suggested such a thing to me.

Q. 13. Please look at the patent, marked "Wollensak's Exhibit Patent," and state whether or not the transom-lifter therein shown and described is the transom-lifter about which you have testified.

A. That is the description of the article we have been using.

Cross-examination:

X Q. 14. How long did you say you had been in business?

A. I have practiced the profession of an architect about twenty years.

X Q. 15. Where?

A. Here, and in St. Louis.

100 X Q. 16. How long here?

A. Since 1871.

X Q. 17. Who are you with?

A. I am in business for myself.

X Q. 18. Where is your business?

A. In the United States Express building—been there four years—87 Washington street.

— Q. 19. When did you first use this Wollensak patent lifter?

A. In 1871, or '72. I came here in the fall of 1871.

X Q. 20. Had you ever seen any kind of transom-lifter prior to this one?

A. Nothing of this character.

X Q. 21. Well, of any kind?

A. Nothing, except a cord or something of that kind.

X Q. 22. Had you ever seen anything, except one constructed with a cord?

A. No.

X Q. 25. You had been engaged in the business of an architect for twenty years?

A. Yes, except three years when I was in the army.

X Q. 24. You have been in the business of a practical architect all that time?

A. Yes.

X Q. 25. Where?

A. In St. Louis, from 1865 to 1871, and here since 1871.

X Q. 26. And never saw any kind of a transom-lifter before this?

A. Nothing, except a cord, or something of that kind, which I made myself; nothing specially put up for that purpose.

X Q. 27. You mean you have never seen anything put up as a specialty?
A. No.

101 Re-examination:

R. D. Q. 28. Please describe the appliances you referred to in your last answers.
A. It was any way to get the transom up; it was usually a cord and pulley.
R. D. Q. 29. That is all that you now have any recollection of?
A. That is all.

Recross-examination:

R. X Q. 30. You know of nothing except a cord and pulley?
A. No.
R. X Q. 31. And you never saw anything else?
A. No.
R. X Q. 32. Prior to the last ten years, was there much attention paid to the matter of ventilation in the construction of houses?
A. There was not.
R. X Q. 33. Within how many years has that matter been specially looked after?
A. It has only been within the last ten years. It is not properly looked after yet.

Stipulation.—It is hereby stipulated that the signatures of the witnesses to the depositions in this case are waived in this case on both sides.

JOHN ADDISON, being duly sworn, testified as follows:

Mr. ELLSWORTH:

Q. 34. Please state your name, age, place of residence and occupation.
A. John Addison; age, 33; residence, Chicago; occupation, architect.
Q. 35. How long have you been a resident of Chicago?
A. Since 1872.
102 Q. 36. How long have you been engaged in the profession of an architect?
A. Well, do you mean myself, practicing?
Q. 37. Practicing.
A. I have been in Chicago since 1872.
Q. 38. Are you acquainted with John F. Wollensak, the complainant in this cause?
A. Yes, sir.
Q. 39. How long have you known him?
A. Since 1872.
Q. 40. Do you know anything about the Wollensak transom-lifter?
A. Yes, sir.

Q. 41. Please look at the patent marked "Wollensak's Exhibit Patent," and state what it represents.

A. It represents what I understand by the Wollensak patent transom-lifter.

Q. 42. When did you first have any knowledge of this transom-lifter?

A. Some time in 1873.

Q. 43. Have you, or not, used this transom-lifter or recommended its use?

A. I have used it very frequently.

Q. 44. You may state whether or not it possesses any utility or value, so far as application to a transom is concerned.

A. It is very valuable and very ornamental.

Q. 45. Prior to the time at which you state you first knew of this transom-lifter, were there, or not, any transom-lifters in use, to your knowledge?

A. Not that I know of. I never saw any.

Q. 46. Who first called your attention to this transom-lifter of Mr. Wollensak's?

A. I think Mr. Wollensak, himself. I think I went into his store to buy some hardware and he showed it to me.

103 Q. 47. State whether or not, in your opinion, or as a matter of fact, it supplies a want which was felt in the matter of building and architects' work.

A. I think it filled the same opening that a door does—that is, that a transom is no good without the transom-lifter, any more than a door opening without a door.

Q. 48. Was there, as a matter of fact, a necessity for the use of such a thing as this transom-lifter?

A. Well, I think it made the transom. I think the transom was no good without the transom-lifter. That is what I mean to say.

Cross-examination.

Mr. TOURTELLOTTE:

X Q. 49. I understand you to say—how long have transoms been in use?

A. How long? Well, I knew of them some time in 1873.

X Q. 50. That was the first you ever heard of any transoms?

A. I never saw a transom until I came to Chicago.

X Q. 51. When did you come to Chicago?

A. In 1872.

X Q. 52. The first time you had ever seen a transom?

A. I think that is so. I might qualify that, if you will allow me, by saying I saw transoms over front doors, but not interior transoms. Transoms were used over front entrance doors.

X Q. 53. But you never saw transoms over interior doors before you came to Chicago in 1872?

A. I think not.

X Q. 54. You saw this shortly after you came here?

A. Yes, sir.

X Q. 55. Where?

A. In Wollensak's store.

X Q. 56. Was it the same as you find here; was it the same
104 as in this exhibit now shown you—this exhibit now before you, called "Wollensak's Exhibit Patent," in this testimony?

A. I think it was.

X Q. 57. It is exactly the same?

A. Yes, sir.

Mr. Ellsworth: Was there or not any objection to the use of transoms prior to the time of the existence of this transom-lifter?

A. I think there was no necessity; the transom was no good without the transom-lifter.

John Middleton, being first duly sworn, testified as follows:

Mr. Ellsworth:

Q. 58. Please state your name, age, place of residence, and occupation.

A. John Middleton; age, 58; am a master carpenter; office, 241 Dearborn St.; reside in the city of Highland Park.

Q. 59. How long have you been engaged in your present business?

A. About twenty-two years, in Chicago.

Q. 60. State whether or not, in the course of your business in Chicago, you have had occasion to make and apply transom windows?

A. I have.

Q. 61. Prior to 1873, can you tell whether or not a transom-lifter was known in the market?

A. Not a transom-lifter proper, but cord and pulleys were used.

Q. 62. How were transoms held open or closed prior to that time, other than by pulleys and cords?

A. Usually with a catch, which was made for the purpose to hold it down, and with a cord and pulley to open it, and
105 sometimes a button, as we term it—a wooden button, to hold it open to any degree that we wished.

Q. 63. This wooden button was a sort of prop, do you mean?

A. That is what it amounted to; it used to screw down to the jam and work to any degree that we wanted it.

Q. 64. From what point was it worked? I mean, could you stand upon the floor of the room to work it?

A. Very seldom; used from a chair, usually.

Q. 65. You had to climb up to it, then?

A. Yes, sir.

Q. 66. Are you acquainted with John F. Wollensak, the complainant in this case?

A. I am.

Q. 67. How long have you known him?

A. I have been personally acquainted with Mr. Wollensak about three years.

Q. 68. Do you know anything about the use of the Wollensak transom-lifter?

A. I do.

Q. 69. Please state what you know about it.

A. I have used the Wollensak transom-lifter in the neighborhood of six years—between six and seven years, I should judge. I fix the time from the fact that I know I never used any before the great fire; it came to my knowledge since that; always known it as the Wollensak lifter; it is specified so in architects' specifications, and were called for several years before I knew Mr. Wollensak personally.

Q. 70. You say they are or were specified as Wollensak's transom-lifters in the specification of architects?

Objected to as leading.

A. They have been.

Q. 71. Are they now, to your knowledge?

A. They are.

106 Q. 72. Please state whether or not the Wollensak transom-lifter possesses any practical value.

A. It does. It is the best lifter I have ever seen, and the best, I think, in use.

Cross-examination waived.

W. L. B. JENNEY, being first duly sworn, testified as follows:

Q. 73. What is your name, age and occupation?

A. My age is forty-eight; occupation, an architect; and I reside in Chicago.

Q. 74. How long have you been in business as a practical architect?

A. I graduated in one of the schools of architecture and engineering in Paris, 1856, and have been in constant practice of architecture and engineering since then, and was an engineer in the army five years. I have been practicing in Chicago for the last thirteen years.

Q. 75. State whether you are acquainted with John F. Wollensak, the complainant in this case.

A. I am.

Q. 76. How long have you known him?

A. Principally, since 1871; had some slight acquaintance before that.

Q. 77. Are you familiar with the construction and operation of the transom-lifter made and sold by him, called the Wollensak transom-lifter?

A. I am.

Q. 78. When did you first have a knowledge of it?

A. It was after the Chicago fire.

Q. 79. How was your attention called to it?

A. It was presented to the architects' offices by models or full-

sized specimens. I think that was the way that it was brought to my attention.

107 Q. 80. By whom?

A. I do not remember who it was. It was some one that came there that was connected with Mr. Wollensak. I was informed where I could get it.

Q. 81. It was first represented as the Wollensak transom?

Objected to.

A. Yes.

Q. 82. Please state whether it possesses any practical utility or advantage in its use.

A. It does. It enables the transoms over doors, that are extensively used in offices and buildings, to be opened and shut, and secured open at any point, or fastened at any point, and shut with but very little difficulty. It can be manœuvered by a person on the floor. It is very simple in its operation, and does not get out of order. As for myself, I have used it in every building I have constructed since it was presented to me.

Q. 83. State whether or not it filled a recognized want in the art.

A. It did. Before that time we had used the ordinary spring catches, which we could operate by a rod and a hook on the end of it. There was no means for fastening them except at a fixed point, while Wollensak's can be opened more or less, at pleasure. His is less liable to break the transom, especially where there are heavy transoms.

Q. 84. This prior contrivance that you refer to, was it anything more than a hook and staple?

A. It was the ordinary spring catches which you buy in the hardware stores; it would fasten and shut the transom. We had a hook on the end of a rod and would pull the catch down and at the same time open the transom. But there was difficulty, more or less, and liability to break the transom.

Q. 85. The hook you refer to, was that connected with the transom?

108 A. No. It was connected with a rod which we use in pulling open and shut windows.

Q. 86. It was a mere pole that was placed anywhere in a building or room?

A. Yes.

Q. 87. Please look at the patent marked "Wollensak's Exhibit Patent," and state what it represents, if you know.

A. It represents this transom of which I have spoken.

Q. 88. The Wollensak transom?

A. Yes.

Q. 89. Please look at the model marked "Complainant's Exhibit Wollensak Transom," and state what it represents.

A. It represents the same transom of which I was speaking.

Cross-examination:

X Q. 90. Your business has been that of an architect?

A. Yes.

X Q. 91. For how long?

A. Since 1858. Part of the time I have been engaged in engineering.

X Q. 92. How much of the time have you been engaged in engineering?

A. Five years, in the army.

X Q. 93. What kind of engineering?

A. Military engineering during the war. Part of my business is landscape engineering.

X Q. 94. Is this the only kind of engineering you have been engaged in?

A. Except what belongs to architecture; part of the construction of buildings is engineering. I am not a mechanical engineer.

X Q. 95. You have had no practice in mechanical engineering?

A. No.

109 X Q. 96. You have never been engaged in that?

A. No.

X Q. 97. When did you first see the Wollensak lifters, exhibited here and shown to you by the exhibits in evidence?

A. Not until the rebuilding of Chicago after the fire, in '71 or the winter of '72.

X Q. 98. Do you mean in January or December, 1872?

A. It was during the rebuilding of Chicago after the fire.

X Q. 99. It is after the fire, even up to to-day. I want to know about what time after the fire?

A. We commenced to rebuild in the winter of 1872. I must have seen it in the winter of 1872. It was soon after the first buildings were put up directly after the Chicago fire.

X Q. 100. Was it in January, 1872?

A. I can't fix the month. It was during the winter, 1872–'3. I used it in the Portland block, and also in the Fletcher & Sharp building in Indianapolis.

X Q. 101. Was it constructed in the same manner and made as you see it now in this exhibit?

A. Substantially. I think I see some slight changes in the method of construction, but it is substantially the same; probably there are some little variations at this point (witness referring to the hinges of exhibit).

X Q. 102. Are you positive that the lifting rod extended beyond or above the juncture of the lifting arm at that time?

A. To the best of my remembrance, it did.

X Q. 103. Did this rod extend above this point (referring to a point on the operating rod of exhibit)?

A. This is the way it is most familiar to me; whether I have seen it made in any other way I don't know.

X Q. 104. Have you ever seen any other transom-lifter?

A. None except Wollensak's, until I saw this one. (Witness here refers to Reiher exhibit.)

X Q. 105. Did you ever see any appliances used for the purpose of raising and lowering transoms before this one?

A. Nothing in the way of transom-lifters or that resemble this.

X Q. 106. Well, of any kind.

A. They were only make-shifts, as I have described, and never called transom-lifters.

X Q. 107. They were never put on the building before that time?

A. No. Sometimes there was used cords and pulleys.

X Q. 108. Did you ever see any appliance with simply this lifting arm connected with the casing to support the transom?

A. No.

X Q. 108½. Were transoms used extensively before the fire?

A. No.

X Q. 109. Were they raised or lowered by any sort of contrivance?

A. As I have said, we sometimes used cords and pulleys when we could not reach the transom from a chair. There is one in use in greenhouses, made by Hitchings, of New York. It is somewhat like this, but works with cogs and wheels. I never saw that until recently, and some time after the Wollensak transom had been used.

X Q. 110. When did you first see the Reiher patent transom-lifter?

A. I never saw it until to-day.

X Q. 111. You have made no examination of it before?

A. I had no knowledge of it until a few minutes ago.

X Q. 112. Never examined it before?

A. No.

X Q. 113. You stated, if I understood you rightly, that the transom-lifter you first saw was substantially like the one
111 shown you, "Complainant's Exhibit Wollensak Transom"?

A. Yes.

X Q. 114. Now, in the one you first saw, and the ones which you have referred to, if that operating rod didn't extend above the point of juncture with the lifting arm, was that substantially like the one shown you in this exhibit, "Complainant's Wollensak's Patent Transom"?

A. I should think it would be substantially like this, only this one (referring to the Wollensak exhibit model) is the best one, I would say. The upper guide shown in the model increased the steadiness of the movement; that is all. It makes it more steady, but the operation would be identical; the operation is the same.

X Q. 115. Does the upper guide in the Wollensak patent perform any other office than to make it more steady in its operations?

A. I should say it did not.

Re-examination:

R. D. Q. 116. Does the upper guide in a full-sized transom-lifter prevent the operating rod from binding or cramping in the lower guide when such a rod supports the weight of the transom?

A. To some extent, particularly if the transom is a very heavy one and the operating rod a light one.

R. D. Q. 117. When the transom is hung at its lower edge, what would be its effect, in opening or closing, upon the operating rod, providing the upper end of the latter was unprovided with a guide of some kind?

A. It would cause the operating rod to spring or bend if the transom was a heavy one.

R. D. Q. 118. Would it not, then, be practically inoperative?

A. Such a condition might occur.

112 E. S. JENNISON, being first duly sworn, testified as follows:

Q. 119. Please state your name, age, residence and occupation.

A. E. S. Jennison; age, 33; residence, Chicago; occupation, architect.

Q. 120. How long have you been engaged in the profession of an architect?

A. Since 1868.

Q. 121. You have been the architect of many buildings in the city of Chicago, and elsewhere?

A. Yes, sir.

Q. 122. Are you acquainted with John F. Wollensak, the complainant in this cause?

A. Yes, sir.

Q. 123. How long have you known him?

A. Well, I was trying to remember whether I ever met him personally; I am not positive that I did before 1876.

Q. 124. Please look at the model marked "Complainant's Exhibit Wollensak Transom," and state what it represents, if you know?

A. It represents the Wollensak lifter as we know it—the Wollensak transom-lifter.

Q. 125. When did you first know of that transom-lifter?

A. We have in our possession a letter that would give that date; it was some time in 1873 or 1874; I should say (witness referring to the letter) February, 1874. Some time in 1873 is the first time I remember seeing this.

Q. 126. It is known generally as the Wollensak transom-lifter among architects and builders?

A. Well, I only know for myself. I always specified it as such, and get goods under that specification.

Q. 127. You use it, then, considerably in your specifications for building?

A. I have hardly ever built without using it in some shape since I have known of it.

113 Q. 128. Do you or not regard it as of considerable value and utility?

A. That is evidenced by the fact that we have used it; as I say, I do not recollect a building in which we have not used it in some shape since I have known it.

Q. 129. Do you know whether or not there was any transom-lifter used prior to this transom-lifter of Wollensak's?

A. I do not recall anything, except a rope with a pulley.

Q. 130. This is the first transom-lifter, then, that has ever been introduced to the market, so far as you know?

A. Yes, sir.

No cross-examination.

JOHN J. SHERMAN, being first duly sworn, testified as follows:

Q. 131. What is your name, age, residence and occupation?

A. John J. Sherman; age, 44; residence, 68 West Madison street, Chicago; occupation, carpenter and joiner.

Q. 132. How long have you been engaged in that business?

A. Since 1872; that is I have carried on business since 1862, and I commenced at it in 1852.

Q. 133. Have you, in the course of your business, applied transom-lifters to transom windows?

A. Yes, sir.

Q. 134. When did you first commence to do this?

A. I think it was in 1873 I used the first one.

Q. 135. What did you use then?

A. Used this Wollensak lifter.

Q. 136. Whom did you buy them of?

A. I always bought them of Mr. Wollensak.

114 Q. 137. Look at the model marked "Complainant's Exhibit Wollensak Transom," and state whether or not you find the Wollensak lifter therein.

A. Yes, sir, that is the Wollensak lifter.

Q. 138. That is the kind you first commenced to use?

A. Yes, I think it has been that way all the time.

Q. 139. What value do they possess?

A. I think they possess great value in opening and operating transoms.

Q. 140. Before that time, what did you use for opening and closing transoms?

A. Well, the only thing that we used then was pulley and cord.

Q. 141. You have used this pretty extensively?

A. Yes, I have put up quite a number.

Q. 142. Looking again at the model, will you state, as a practical builder, the functions that are performed by the guide for the upper end of the lifting rod?

A. Well, the guide is to steady the rod to hold it in its place.

Q. 143. Without using it, what would be the effect?

A. The operating rod would bend and twist.

Q. 144. Would it then become practically inoperative?

A. It would not operate.

Q. 145. Why would it not operate?

A. Because the rod would get out of place.

Q. 146. Have the transom-lifters of Wollensak's come to be known as a general article of trade in hardware stores?

A. Yes, they are found, I guess, in all hardware stores.

Q. 147. Have come to be recognized as a standard article?
A. Yes, sir.

Cross-examination:

X Q. 148. You don't know what other transom-lifters may have been used without your knowledge, here and elsewhere?
A. I only know what has been used in Chicago.

115 MATTHEW B. SWEEZEY, being first duly sworn, testified as follows:

Q. 149. Please state your name, age, residence and occupation.
A. Matthew B. Sweezey; age 56; residence, 3148 Vernon avenue; occupation, builder and carpenter.
Q. 150. How long have you been engaged in the business of building and carpentry?
A. Well, about thirty years. All my life, as long as I can remember.
Q. 151. How long have you been in business in Chicago?
A. Since 1872—the spring of '72.
Q. 152. In the course of your business do you have occasion to apply transom-lifters to the transom windows over doors in buildings?
A. Yes, sir.
Q. 153. What transom-lifters have you applied?
A. I have never applied any other than Wollensak's.
Q. 154. When did you first know of Wollensak's transom-lifter?
A. I think it was in 1874 that I first heard of it.
Q. 155. How did you happen to see it?
A. A party I was at work for said he had seen something of the kind somewhere, and if I would go to a certain hotel—I forget the name of it now—the proprietor of the hotel would show one to me; he had one in his hotel. So I went there—I forget where it was—and he told me where he got it; so I went to Wollensak's and got one, and ever since that time I have been using it.
Q. 156. The Wollensak transom-lifter was the same one that was at the hotel?
A. The same one; it had his name on it. The man said
116 he didn't know where it came from, but I found his name on it, so I knew where to find it. I didn't know him previously.
Q. 157. State whether or not the transom-lifter shown in the Exhibit Wollensak Transom is the Wollensak lifter you have referred to?
A. Yes, sir. He has got three different arrangements of the transom. I have used them all—all three; sometimes hung from the top, sometimes from the center, and sometimes from the bottom, as they are here.
Q. 158. The same as in the model?
A. The same as in the model.

Q. 159. State whether or not this Wollensak transom-lifter has any value or utility in its use?

A. It is very valuable and very useful, both.

Q. 160. Prior to your knowledge of this Wollensak transom-lifter, what other transom-lifters, if any, do you know of before then?

A. I never knew of any other before this, except to operate them with cord and pulley; used to do that quite often; they were out of reach; had a cord and pulley, so we had to hoist up to reach it on a chair or something.

Q. 161. That is all you know of?

A. There was another operation attached to a little rod that had holes in it, to hitch like that to shove it out or draw it back, the same as is used in church ventilating sash; the long drop, they call it.

Q. 162. Do you mean that this rod was attached at one end to the swinging end of the transom window, and passes through the window opening to connect with the transom bar in some way?

A. Yes, sir; it is an old device; been used a great many years; that is a very plain thing.

Q. 163. How could you reach it when applied to a transom—from a chair?

A. Had to get up on a chair or something to reach it.

Cross-examination waived.

117 THEODORE B. WADSKIER, being first duly sworn, testified as follows:

Q. 164. What is your name, age, residence and occupation?

A. Theodore B. Wadskier; age, 50; residence, 3011 Michigan avenue; am an architect.

Q. 165. How long have you been a practical architect?

A. Well, I have been in the business since 1850; that is, I have been engaged in the architectural business since that time; I have been in business for myself 27 or 28 years. I have been here since 1857—March, 1857.

Q. 166. You are familiar, then, with the various appliances used in buildings for the operation of doors, transoms, windows, etc.?

A. Well, I only know of one kind.

Q. 167. What kind is that?

A. That is Wollensak's transom-lifter.

Q. 168. When did you first know of Wollensak's transom-lifter?

A. I think it was in 1873; might have been in 1874.

Q. 169. How was it first brought to your attention?

A. Well, I think the first time I saw it was in some building.

Q. 170. Are you acquainted with Wollensak, the complainant?

A. Yes, sir.

Q. 171. How long have you known him?

A. Well, I think I have known him personally—about—between two and three years; about three years.

Q. 172. Please look at the model, marked "Exhibit Wollensak's Transom," and state what it represents.

A. Well, there are three different transoms—three transoms hung in three different ways; one at the top, one in the center, and one at the bottom.

118 Q. 173. What transom-lifter is shown on that model?

A. This is Wollensak's.

Q. 174. That is the one you have testified about, is it?

A. Yes, sir.

Q. 175. Does that transom-lifter—Wollensak's transom-lifter, I mean—possess any value as a matter of convenience or utility?

A. Yes, I think it has very great value.

Q. 176. Do you or not specify the use of the Wollensak transom-lifter in your specifications?

A. Well, I have always done so, from the fact that I have never used any other.

Q. 176½. Do you know whether or not the transom-lifter of Wollensak's is extensively used?

A. I think it is, sir, very extensively.

Q. 177. Prior to the time of the introduction of this Wollensak transom-lifter into the market, what means, if any, were used for operating transoms?

A. Well, I never saw any means, except getting up in a chair and putting a block of wood in the transom, or something of that kind—a stick of wood or something.

No cross-examination.

OTIS L. WHEELOCK, being first duly sworn, testified as follows:

Q. 178. Please state your name, age, residence and occupation.

A. Otis L. Wheelock; age, 64; residence, 1250 Wabash Ave.; occupation, architect.

Q. 179. Are you engaged in practicing your profession in Chicago?

A. Yes, sir.

Q. 180. Are you alone?

A. The firm is Wheelock & Clay.

119 Q. 181. How long have you been engaged in that business?

A. I have been in Chicago almost twenty-five years; been engaged in it about thirty-five.

Q. 182. Have you, in the course of your business, had occasion to use or provide the use of transom-lifters for transom windows in buildings?

A. Yes, sir; I have seen the need of them very much, too.

Q. 183. What transom-lifters have you, and do you use?

A. I never used any but Wollensak's. I saw one other kind—saw them one, two or three years ago.

Q. 184. State whether or not, in your opinion, the Wollensak transom-lifter possesses any value or utility in its use?

A. I think it possesses a very great value. It is particularly useful, and it is the most useful thing of the kind I have ever seen anywhere. You all know how much trouble we had in climbing

up on a stool and putting a broom handle or something under the sash to hold it.

Q. 185. Then the Wollensak transom-lifter, when first introduced, and at the present time, supplied a recognized want in the business, did it not?

A. Yes, sir; I should say a very great one.

Q. 186. Please look at this model, marked "Complainant's Exhibit Wollensak Transom," and state whether or not it represents the Wollensak transom-lifter, about which you have been testifying.

A. Yes, sir.

Q. 187. Do you or not specify in your specifications of *of* building the use of the Wollensak lifter?

A. I do, sir, altogether. A man in the office, not ten minutes ago, wants five dozen of them.

Q. 188. When did you first become acquainted with this transom-lifter?

120 A. I should think a year ago; perhaps two years ago; I am quite familiar with hardware stores, and I went in one and happened to see something of the kind, and I went right back and put them in some specifications; that may have been a year ago, and maybe more.

Q. 189. Prior to the introduction of the Wollensak transom-lifter, what was used, if anything, for operating transom windows?

A. Well, sir, for ordinary purposes, merely a sash spring—a spiral spring with a pulley; the sash was hung in the center; hung like that (indicating model), in the center.

Q. 190. Were cords and pulleys ever used?

A. Not that I know of. I never used them.

Q. 191. State whether or not this Wollensak transom-lifter has become a standard article, as known to the profession?

A. I should say it had. I am certain everybody would use them if they could get them.

Q. 192. How long have you known Mr. Wollensak?

A. I don't know him at all, sir.

No cross-examination.

FRIDAY, *December 3rd.*

R. L. NORTH, being first duly sworn, testified as follows:

Q. 193. What is your age, residence and occupation?

A. My age is 51; residence, Chicago; occupation, hardware dealer.

Q. 194. What is the name of your firm?

A. Larrabee & North.

Q. 195. Do you deal pretty extensively in dealer's hardware?

A. Yes, sir.

Q. 196. State how long you have been engaged in this business

A. So far as the city of Chicago is concerned, twenty-two years.

121 Q. 197. Are you acquainted with John F. Wollensak?

A. I am.

Q. 198. How long have you known him?

A. Twelve or fourteen years.

Q. 199. Do you know anything of what is known as the Wollensak transom-lifter?

A. I do.

Q. 200. When did you first have knowledge of it?

A. Well, I should think, my recollection of it would be, that it was in the spring of 1872.

Q. 201. That is as near as you now remember?

A. Yes.

Q. 202. Please look at this model before you, marked "Complainant's Exhibit Wollensak Transom-lifter," and state what it represents, and what you knew about it in 1872, and what you now know about it.

A. That is what I know as the Wollensak patent lifter.

Q. 203. What was in the market, so far as your knowledge goes, prior to the introduction of this transom-lifter to the trade, for the purpose of operating transoms?

A. Well, I do not remember anything except a combination of cords and pulleys, or something of that kind. There was nothing specially made for that purpose.

Q. 204. Within your knowledge or experience, was Wollensak the creator of this trade in transom-lifters?

A. So far as I know, he was.

Q. 205. Have they, or not, become a standard article in the trade?

A. They have.

Q. 206. Very extensively?

A. Yes, very extensively.

Cross-examination:

X Q. 207. Do you know of any other transom-lifters in the market?

A. Yes.

122 X Q. 208. What other transom-lifters?

A. There are one or two.

X Q. 209. What are they?

A. I see a model here representing the Reiher patent. I think that is it.

X Q. 210. What other transom-lifters do you know in the market?

A. There was one made somewhat on this principle, which operated with catches, something like the old-fashioned window-shade.

X Q. 211. Are there any other transom-lifters, aside from Wollensak's, sold extensively in the market?

A. The question is a little more general than I can answer. So far as I know, the Wollensak (in this market) lifter is sold in very much larger quantities than any other; it is almost entirely the one sold.

OSWALD LOCKET, being first duly sworn, testified as follows:

Q. 212. What is your age, residence and occupation?

A. My age is 37; reside in Chicago, and am hardware merchant.

Q. 213. What is the name of your firm?

A. Orr & Locket.

Q. 214. Do you deal extensively in dealers' hardware and other hardware?

A. Yes.

Q. 215. How long have you been engaged in the hardware business?

A. Something over eighteen years in this city.

Q. 216. Are you acquainted with the Wollensak transom-lifter?

A. Yes.

Q. 217. How long have you had a knowledge of that lifter?

123 A. Ever since it was introduced. It seems to me that it dates back of 1872. I used to run into his shop before 1872, and perhaps noticed its construction. I have certainly known it since '72. It has been the only one in the market. It has gradually crept in the market.

Q. 218. Was it introduced by Wollensak?

A. So far as I know.

Q. 219. Has it become an extensive article in the hardware market?

A. Yes.

Q. 220. Would you regard Wollensak as the originator of that trade?

A. So far as I know, I would.

Q. 221. Do you find the Wollensak transom represented in that model?

A. Yes.

Q. 222. You have sold considerable many of them, have you not?

A. Yes.

Q. 223. What was the state of the art prior to the introduction of the Wollensak lifter, so far as you know?

A. We used all sorts of devices in the shape of pulleys and tackle, but nothing as a transom-lifter.

Q. 224. But there was no specialty in the trade?

A. No.

Cross-examination:

X Q. 225. Do you know anything about the trade, except here in Chicago?

A. No, not definitely, except what I see in the Iron Age and in the Commercial Reporter.

X Q. 226. You have no knowledge but that other transoms were made and put in the market before this time?

A. No; I cannot tell, only what I know of myself.

X Q. 227. You have not had that in your store as an article of merchandise?

A. No.

124 Re-examination:

R. D. Q. 228. You refer to the Iron Age. Is that a paper published at Pittsburg?

A. It is a New York paper, giving all the new inventions.

R. D. Q. 229. I suppose your business, to a greater or less extent, is such that you see the articles in which you deal catalogued by the wholesale dealers?

A. Yes, to a great extent.

R. D. Q. 230. You receive from different parts of the country these catalogues?

A. Yes.

Q. D. Q. 231. They go generally to the trade?

A. Yes.

R. D. Q. 232. Most of the dealers have them?

A. Yes.

R. D. Q. 233. How long have these catalogues been in vogue?

A. That it difficult to answer; they gradually crept in, and now they are a universal thing; they have become general within the last four or five years.

R. D. Q. 234. Is it, or not, true that in these catalogues various articles of hardware are exhibited or referred to?

A. I do not understand that question.

R. D. Q. 235. Various articles of hardware—I refer to standard articles—are generally represented in these catalogues?

A. By different makers and inventors, yes.

R. D. Q. 236. The articles are illustrated and described?

A. Yes.

R. D. Q. 237. These catalogues enable you to understand pretty generally the condition of the trade throughout the country?

A. Yes, with the parties for which they are issued.

125 R. D. Q. 238. I will ask you if in any of the catalogues you have ever seen illustrated and described, prior to your knowledge of the Wollensak transom-lifter, any transom-lifter whatever?

A. I do not remember of having seen anything of that kind; before that time it was always something that we had to use our own ingenuity about.

Recross-examination:

R. X Q. 239. You do not know but that they may have been in use in other places and in other markets?

A. I do not

By Mr. Ellsworth:

Q. 240. In your last answer, what do you understand by other markets?

A. Outside of Chicago.

FREDERICK BAUMAN, being first duly sworn, testified as follows:

Q. 241. What is your age, residence and occupation?

A. My age is 55; residence, Lake View; occupation, architect.

Q. 242. How long have you been engaged in the business of a practical architect?

A. Oh, years.

Q. 243. How long in the city of Chicago?

A. About twenty-nine years.

Q. 244. Are you familiar with general house architecture in this country?

A. I am to some extent.

Q. 245. Your profession requires you to be familiar with the various styles of architecture in this country and in Europe?

A. Yes.

Q. 246. You are obliged to examine many books in this connection?

126 A. Yes, what books are necessary to keep posted on my subject.

Q. 247. Are you acquainted with John F. Wollensak?

A. I am.

Q. 248. How long have you known him?

A. For fifteen or twenty years.

Q. 249. Please look at the "Complainant's Exhibit Wollensak Transom," now before you, and state what it represents.

A. It represents what is called and ever has been called Wollensak's transom rod.

Q. 250. When did you first know of that?

A. My impression is that it was shortly before the fire. After the fire it was generally introduced here.

Q. 251. State whether or not it filled a want that was generally felt in the trade.

A. It certainly filled a want in the trade. It drew my attention at once and I acknowledged the use of it.

Q. 252. Prior to the existence of this Wollensak transom-lifter, what was there that was known as a means for accomplishing the same purpose?

A. Nothing. We had to use a chair to get up to the transom. We sometimes used a wheel and a spring.

Q. 253. These were used as sort of make-shifts?

A. Yes.

Q. 254. Then, so far as your knowledge goes, was Mr. Wollensak the first to introduce the thing?

A. So far as my knowledge goes, he was the first to introduce it to the trade.

Q. 255. What would you say as to its usefulness?

A. I thought at the time that it was useful, and I think it is very generally used.

Q. 256. Do you, or not, recognize its use in your business?

127 A. I do. I do not believe that a transom is used in any house that has not the Wollensak transom-lifter.

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Q. 256. Do you, or not, recognize its use in your business?

127 A. I do. I do not believe that a transom is used in any house that has not the Wollensak transom-lifter.

Q. 257. Referring again to this model, "Complainant's Exhibit Wollensak Transom-lifter," I will ask you, when you apply your finger to the lower end of the lifting rod and force it upward, do you or not, lift any weight?

A. Certainly, a man lifts a weight by so doing.

Q. 258. What is that weight?

A. The weight of the transom.

Q. 259. Suppose, if you please, that the transom were hung at the bottom instead of at the top, would you have any weight to lift?

A. You would, to shut the sash.

Q. 260. When you are lifting this weight to close the sash, is there or not any lateral strain or pressure on the lifting rod?

A. There is, of course.

Q. 261. Under such circumstances, as, for example, if this upper guide were left off, what would be the effect of that lateral strain upon the operating rod?

A. It would bend the operating rod against the door facing.

Q. 262. Under such circumstances, would such a transom-lifter be practically operative?

A. It would not, because it would scratch the pane and stop there.

Q. 263. Would it or not bind in the guides?

Objected to.

A. It would bind in the guides.

Q. 264. Is it or not essential, in your opinion, to have some guide in the upper end of the lifting rod?

A. It is very essential.

Q. 265. In your profession as an architect, do you ever superintend the building or construction of buildings?

A. I always do.

128 Q. 266. In that superintendence, what work do you do?

A. I see that the work is carried out according to the specifications.

Q. 267. State whether or not you have a practical knowledge of such matters as well as a theoretical knowledge.

A. My knowledge is entirely of a practical nature.

LUCAS HUNT, being first duly sworn, testified as follows:

Q. 268. What is your age, occupation and residence?

A. My age is 36 years; occupation, hardware dealer, and am a member of the firm of Edwin Hunt's Sons; reside at 180 Lake street.

Q. 269. How long have you been engaged in the hardware trade?

A. I have been in it all my life.

Q. 270. Are you acquainted with John F. Wollensak?

A. Yes; I have known him as long as he has been here; I do not know how many years, but I think fifteen or twenty years.

Q. 271. Look at the model before you and state what it is.

A. It is the Wollensak transom-lifter.

Q. 272. When did you first have a knowledge of that?

A. I could not say; it is a recent article in the hardware line.

Q. 273. Is your firm dealing in these articles?

A. Yes, some.

Q. 274. You have sold considerable numbers of them, have you not?

A. Yes.

Q. 275. When did you first have a knowledge of this transom-lifter?

A. I presume it was soon after he had it patented.

129 Q. 276. Was it or not introduced to you by Wollensak?

Objected to.

A. Yes, it must have been, of course.

Q. 277. After its introduction to the trade, did it or not have a recognized place or become a recognized article in the trade?

A. Very decidedly so.

Q. 278. Prior to the introduction of this Wollensak transom-lifter, do you know of anything in the trade for that purpose?

A. I do not think there was anything at all; there might have been an arched iron quadrant that you had to get on the top of a ladder to adjust.

Q. 279. Do you or not regard Wollensak as the creator of the trade in transom-lifters?

A. Yes, I think he is.

Q. 280. Are these articles not standard articles in the trade?

A. I think so; it is one thing of its kind.

Cross-examination:

X Q. 281. You deal in no other transom-lifters aside from Wollensak's?

A. I do not think we ever sold any other.

X Q. 282. You deal entirely in that kind?

A. Yes.

X Q. 283. Do you know of any other now in the market?

A. I believe there is one gotten up by the party that you represent.

X Q. 284. You know of nothing else?

A. No.

X Q. 285. You do not sell that?

A. No.

Re-examination:

R. D. Q. 286. What is the other transom-lifter that you know of?

130 A. This one (referring to the Reiher transom-lifter).

R. D. Q. 287. Do you know of this one in the trade?

A. I know of its being brought to us to sell.

R. D. Q. 288. Who brought it?

A. I guess this man, Reiher.

GEO. E. BLISS, being first duly sworn, testified as follows:

Q. 289. What is your age, residence and occupation?
A. My age is 48; occupation, hardware dealer; residence, Chicago.
Q. 290. Are you in business for yourself?
A. I am one of the firm of Kellogg, Johnson & Bliss.
Q. 291. Do you or not deal extensively in builders' hardware?
A. Yes, we do.
Q. 292. How long have you been in the business?
A. Some twenty-five years.
Q. 293. Are you acquainted with the complainant in this case?
A. Yes.
Q. 294. Are you acquainted with the defendant, Reiher?
A. Yes.
Q. 295. Please look at the model, marked "Reiher Exhibit Transom," and state what it is.
A. It is a device for opening and closing transoms.
Q. 296. When did you first have any knowledge of that transom?
A. About a year ago; that was a little different from this; well, I would say about six months ago.
Q. 297. Has your firm bought that transom of Reiher?
A. Yes
Q. 298. And sold them?
A. Yes.
Q. 299. To any considerable extent?
131 A. Well, no, not to a large extent. I guess most of the parties go right to Wollensak or Reiher themselves and buy. We have, probably, sold fifty or more.
Q. 300. When was the first time that you knew of a transom-lifter?
A. Anything of this kind, in 1873; possibly 1872. Wollensak's was the first one that was offered here. Of course there were other devices for that purpose, such as cords and pulleys.
Q. 301. Is that the Wollensak transom-lifter, shown in that model?
A. It is.
Q. 302. The Wollensak lifter is the first one you ever saw?
A. Yes, that worked in that way.
Q. 303. Prior to the time you first had knowledge of it, what was in the market?
A. We had to use cords and pulleys, except what was known as a skylight-lifter; there had been an arrangement of that kind for some time, but that could not be used on the transom.
Q. 304. Do you know whether or not Wollensak introduced this article to the trade?
A. Yes.
Q. 305. Has he built up a trade in that?
A. He has.
Q. 306. Has that become a standard article in the market?
A. It has.
Q. 307. How long have you been in Chicago?

A. Seventeen years next May.

Q. 308. Do you know anything of the trade elsewhere than in Chicago?

A. Yes, it is quite extensive.

Q. 309. In what parts of the country?

132 A. St. Louis, St. Paul, Davenport, New York, Boston, Detroit, Cleveland, Buffalo and Cincinnati.

Q. 310. Do you or not have a general knowledge of the hardware trade?

A. Yes, sir.

Cross-examination:

X Q. 311. Do you know of the hardware trade in Joliet?

A. Yes, sir.

X Q. 312. Do you or not know of the hardware trade in Waukegan?

A. No.

G. S. STANDART, being first duly sworn, testifies as follows:

Q. 313. What is your age, residence and occupation?

A. My age is 48; my residence, Chicago; occupation, hardware merchant.

Q. 314. Are you in business for yourself?

A. Yes; I have no partners.

Q. 315. How long have you been engaged in the hardware trade?

A. Since 1855.

Q. 316. Are you acquainted with the hardware trade generally?

A. Yes, I profess to be.

Q. 317. Do you deal in builders' hardware?

A. Yes.

Q. 318. In what department of hardware do you class transom-lifters?

A. Builders' hardware.

Q. 319. Do you know Wollensak?

A. Yes, I have known him since 1874; since I have been in Chicago.

133 Q. 320. Do you know anything about the Wollensak transom-lifter?

A. Yes.

Q. 321. How long have you known it?

A. Since 1872 or 1873; I knew of it in Detroit.

Q. 322. Look at this model, "Complainant's Exhibit Wollensak Transom," and state what it represents.

A. It represents different forms of the transom-lifter.

Q. 323. Have you ever dealt in it?

A. Yes.

Q. 324. To a considerable extent?

A. Well, quite a number, but not as many as a good many others.

Q. 325. Is it an article of general utility in the hardware trade?

A. Yes; almost indispensable.

Q. 326. Who established the trade in that article?
A. Wollensak.
Q. 327. What was there in the market prior to Wollensak's lifter?
A. Nothing of any importance. There was the cord device, and one made to hang at the top where you could push out the bottom.
Q. 328. How did you get at that?
A. You had to get on a chair or step-ladder.
Q. 329. Is this lifter a standard article in the trade?
A. Yes, and has been since it was introduced.

Cross-examination:

X Q. 330. You deal in the Wollensak lifter, do you?
A. Yes.
X Q. 331. Have you any other?
A. Yes.

134 B. F. Homer, being first duly sworn, testified as follows:

Q. 332. What is your age, residence, and occupation?
A. My age is 45; residence, 642 Monroe St.; occupation, hardware merchant.
Q. 333. What is the name of your firm?
A. Hodge & Co.
Q. 334. How long have you been engaged in the hardware trade?
A. Twelve or twelve and a half years.
Q. 335. Are you acquainted with the hardware trade generally throughout the country?
A. Yes.
Q. 336. How did you acquire that knowledge?
A. By buying and selling goods to customers.
Q. 337. Do you have catalogues?
A. Not very extensively. I have some small ones.
Q. 338. Please look at the Complainant's Exhibit Wollensak Transom, and state what it is, if you know?
A. I suppose it to be a transom-lifter for raising and lowering transoms, and is known as the Wollensak transom-lifter.
Q. 339. When did you first have a knowledge of it?
A. Nine or ten years ago.
Q. 340. How did you become acquainted with it?
A. I think the first acquaintance was by seeing a model of it in his store. I had heard it spoken of before that.
Q. 341. Have you used this article?
A. Yes, I have used them and sold them.
Q. 342. Have you sold them to any extent?
A. We have sold them along every week during the time.
Q. 343. What was there in the trade prior to the introduction of this Wollensak transom-lifter?
A. I never knew anything before I saw this.
135 Q. 344. Who established the trade in it?
A. I think that Wollensak established the trade here.

Q. 345. Is it a standard article of trade?
A. Yes.
Q. 346. Do you know whether he sent out any circulars?
A. He did.
Q. 347. Illustrating and describing it?
A. Yes; showing its working, and the various sizes and prices.

Cross-examination:

X Q. 348. You sell Wollensak's transom-lifter, and no others?
A. I have some others.

Re-examination:

R. D. Q. 349. What other transom-lifter have you sold?
A. This one represented here. (Referring to the Reiher transom.)
R. D. Q. 350. Who introduced the Reiher transom to you?
A. Reiher first called my attention to it.
R. D. Q. 351. You have had some of them?
A. Had a few.
R. D. Q. 352. Have you sold any of them?
A. Some few.

Richard Pennington, being first duly sworn, testified as follows:

Q. 353. What is your age, residence and occupation?
A. My age is 51; residence, Chicago; carpenter and builder, and superintendent for Charles Busbee in building.
Q. 354. How long have you been engaged in your business?
A. Thirty years in this city.
136 Q. 355. Please name some of the buildings you have superintended the construction of.
A. At the present time I am superintending the building at the corner of Randolph and Dearborn, for Borden; also one on Lake avenue, for John Borden. We have built on Michigan avenue a block of thirteen; another block of four, and in the rear of it, on Indiana avenue, another block; and further down on Indiana avenue another block; and have built several single houses on Michigan avenue. At one time he was doing more work than any one in the city.
Q. 356. Are you acquainted with John F. Wollensak?
A. Yes.
Q. 357. How long have you known him?
A. Two or three years—perhaps four.
Q. 358. Do you know a device for transom windows known as Wollensak transom-lifter?
A. Yes.
Q. 359. Please look at the model marked "Complainant's Exhibit Wollensak Transom," and state what it represents.
A. It represents the Wollensak transom-lifter.
Q. 360. Is that the one about which you testified?
A. Yes.

Q. 361. State whether you have used this Wollensak transom-lifter?

A. We have used a good many of them; we used them in the Honore building. We have used a great many of them and always found them to answer the purpose.

Q. 362. State whether you have found them of utility and value?

A. They are very practical, indeed. I could not see how they could be improved and answer the purpose for which they were designed.

Q. 363. Before you became acquainted with the Wollensak transom, what was the state of the art?

137 A. I never saw anything but pulleys and cords, and I have never heard of anything.

Q. 364. Referring now to the Wollensak model before you, will you state what was the office of the upper guide?

A. It is a part that is indispensable. It would not work without it to any advantage.

JAMES M. HORTON, being first duly sworn, testified as follows:

Q. 365. What is your age, residence and occupation?

A. My age is 54; residence, 499 West Adams street; occupation, hardware merchant, and am a member of the firm of Wm. Blair & Co.

Q. 366. How long have you been engaged in the hardware trade?

A. With the exception of about six or seven years, I have been in the business since 1842.

Q. 367. Elsewhere than in Chicago?

A. I commenced in Albany, N. Y. At that place I was in a large wholesale and retail house about seven or eight years; then I went into a house that was more exclusively wholesale for about the same length of time. I was in the hardware business about two years in Ohio, and have been in Chicago since 1866.

Q. 368. Are you or not acquainted with the hardware trade in the United States?

A. That is a pretty broad question. I am not acquainted with the Southern trade, but throughout the North I am.

Q. 369. Are you acquainted with it in New York and Boston?

A. I have never been in business in those cities, but there is no peculiarity in the New York and Boston trade; they all sell the same kind of goods.

Q. 370. Are you acquainted with John F. Wollensak?

A. I am, in a business way.

138 Q. 371. How long have you known him?

A. I have known the Wollensak family since 1842. I knew the old man Wollensak in Albany. He was a locksmith.

Q. 372. Do you know what is known as the Wollensak transom-lifter?

A. It seems to me that it was the fall after the fire that we had letters from parties in the East enquiring about it, and we made

some purchases. I cannot say positively as to the time; it may have been later than that, but not earlier.

Q. 373. Do you or not sell this transom-lifter?

A. Yes, but we do not carry them in stock, but buy them of Wollensak and sell them.

Q. 374. Who established the trade in this Wollensak transom?

A. Wollensak, I suppose.

Q. 375. Is it or not a standard article in the hardware trade?

A. For that purpose it is recognized as such.

Q. 376. Prior to your knowledge of this Wollensak transom-lifter, what was there in the trade or general use for opening and closing transoms?

A. I never saw anything especially for that purpose. We used cords and other methods of keeping the windows closed. I have seen them use the boot-jack.

Q. 377. You think it was in 1872 that the inquiries were made for this transom-lifter?

A. Yes.

Q. 378. Do you remember who these inquiries were from?

A. I have no recollection. I have an impression that it was some one in Rochester. He gave us a description of it and requested us to get it for him and send it to him, which we did. I have no means of ascertaining now who it was.

139 Cross-examination:

X Q. 379. Do you sell any other transom-lifters, aside from Wollensak's?

A. No.

AMOS GRANNIS, being first duly sworn, testified as follows:

Q. 380. What is you age, occupation and residence?

A. My age is 55; occupation, builder; residence, Chicago.

Q. 381. How long have you been engaged in building?

A. About thirty-five years.

Q. 382. Have you built quite extensively in the city of Chicago?

A. Yes.

Q. 383. Name some of the buildings you have erected here.

A. Before the fire, I built two or three blocks on Lake St.; a block on Wabash; one on Randolph; two on the corner of S. Water and Dearborn Sts.; 75 and 77 Wabash Ave.; building at the corner of Clark and Madison; a building on Clark, between Lake and Water; two or four on Water St., and several fine dwellings.

Q. 384. Are you acquainted with John F. Wollensak?

A. Yes.

Q. 385. How long have you known him?

A. By reputation, since the fire, and probably before the fire, and, personally, I have known him two or three years.

Q. 386. Do you know an article of dealers' hardware known as Wollensak's transom-lifter?

A. Yes, have known it since the fire, and have used it.

Q. 387. Have you used it to any considerable extent?

A. Not to any great extent. We used it after the fire.

140 Q. 388. As a practical device, does it possess any special merit?

A. Well, yes, I think it is the best device that I know of for the purpose.

Q. 389. Prior to your knowledge of this transom-lifter, what was there in use for that purpose?

A. A cord and pulley.

Q. 390. Was his the first known to the trade?

A. The first to my knowledge.

Q. 391. Look at the model marked "Complainant's Exhibit Wollensak Transom," and state what it represents.

A. It is Wollensak's device for transom-lifters.

Q. 392. Please observe the guide for the upper end of the operating rod, and state if it serves any special function.

A. Yes, I think it necessary to the smooth and even working of the device that that guide should be there.

Q. 393. Without it, would there be a practical defect in the machine?

A. I think so.

Q. 394. What would be the result?

A. In raising this (illustrating) up it would press this in (illustrating) and cause friction; it would not work near as easy.

Q. 395. Would it make the whole thing impracticable in its operation?

A. I would hardly call it a successful operating device.

141 DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the files of this office of the file-wrapper and contents of the appeal to the examiners-in-chief, in the matter of the reissue application of J. F. Wollensak, filed June 16, 1880, for transom-lifter and lock.

In testimony whereof I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto [SEAL.] affixed this fourteenth day of September, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

E. M. MARBLE,
Commissioner.

Honorable Commissioner of Patents.

SIR: I hereby appeal to the examiners-in-chief from the decision of the principal examiner in the matter of my application for reissue of letters patent No. 136,801, dated March 11, 1873, for improvement in transom-lifters and locks, filed September 18, 1878, which application, on the 15th day of October, A. D. 1879, was rejected the second time. The following are assigned as reasons of appeal:

The examiner erred in rejecting the application upon the claims originally presented.

The examiner erred in not allowing the claims originally presented.

J. F. WOLLENSAK,
By E. A. ELLSWORTH,
His Attorney.

142 *Statement of the Case and Points Relied Upon in Support of Appeal.*

Prior to Wollensak's invention, transom-lifters had been composed of a long vertical rod arranged to move through guides on the door casing, its upper end projecting a considerable distance above the upper guide and jointed to the transom by a pivoted connecting rod. An example of the lifter is shown on the transoms of the examiners-in-chief's rooms.

The upper projecting end of the lifting rod has no lateral support, and being made of a small iron rod, is liable to be easily bent.

The function of the rod is to sustain the weight of the transom in opening and closing, and as the end of the connecting rod pivoted thereto moves in the arc of a circle while sustaining the weight of the transom, such weight is transmitted to the long upper end of the operating rod in a lateral direction, and has the effect of bending it to such an extent as to prevent it from moving freely through the guide. The bends are either permanent and destroy the rod for practical use, or the rod vibrates above the guide and thus binds therein. To overcome these defects, Wollensak provides a guide for the upper end of the rod, by which its movements are steadied and the lateral bends prevented. Many expedients may be resorted to for guiding the end of the rod, one of which he shows and describes.

The rejected claims cover this guide in combination with the rod and transom, and the rod, transom and lifting-arm.

To meet the invention as well as the claims, the examiner cites the patent to Bayley and McCluskey, No. 79541, dated July 7th, 1868, for railroad-car ventilators.

This patent shows the raised roof windows of a railroad car, hinged on one vertical edge to swing sidewise. A horizontal bar,
143 extending the whole or half length of the car, is pivoted by short links to the swinging ends of the windows. The bar is held in its horizontal position by loops or staples in the side of the car, and its movement horizontally opens and closes the windows.

The legal point involved is, whether or not the use of the sliding rod to open the windows of a railroad car would suggest the use of an upper guide for the operating rod of the transom-lifter, without invention. This involves the sole question of double use. The examiner is of opinion that it is mere double use. I take the opposite view, that it is not mere double use, but involves invention because

it produces a result different in kind. Wollensak uses the guides for the vertical operating rod, to overcome a defect practically existing in the old transom-lifter, *i. e.*, he produces a new result in transom-lifters, by which they are benefited or perfected in their operation. This defect does not exist in the reference. There is no strain on the horizontal rod from the weight of the windows. The object of several guides is to prolong the rod for operating several windows at once, and there is no possibility of strain upon the rod. Wollensak's invention relieves the rod under strain of the weight of the transom. This new function due to the change of position and combination, necessarily involves invention and is something more than mere double use, or obvious change. If in changing from the car to the window no new function was produced, it would be mere double use. If the only result produced was the opening and closing of the transom, there would be no invention, because opening and closing car windows would be the same in kind. But where there is a new function performed, then the change is one in substance and not a new occasion for the use of the device.

I desire to be heard orally before the examiners-in-chief.

Respectfully,

E. A. ELLSWORTH,
Att'y for Wollensak.

144 Room 153. June 17, 1880.

In the United States Patent Office.

In the Matter of the Reissue Application of JOHN F. WOLLENSAK for a Patent for a Transom-lifter and Lock, filed Sept. 18, 1878. } Appeal to the Board of Examiners-in-Chief.

Examiner's Answer to Reasons of Appeal.

The claims upon which appeal is taken are as follows:

"1st. The combination with a transom, its lifting-arm and operating rod, of a support for the upper end of the operating rod, to prevent it from being bent or displaced by the weight of the transom.

"2nd. The combination with a transom, its lifting-arm and operating rod, of a support and guide for the upper end of the operating rod.

"4th. The guide G' arranged above the junction of the lifting-arm and upright rod, in combination with the prolonged rod V, the guide G, and arm A, substantially as and for the purpose specified."

The single reference upon which the claims are rejected is the patent of G. W. R. Bayley and J. McCluskey, No. 79541, July 7, 1868. (Ventilating-windows.) Applicant restores the first and second claims which have been erased and now appeals upon claims one, two and four, which are precisely the same in scope, varying only in the collocation of the words.

The examiner objects to this way of appealing upon several claims all alike, when the utmost an applicant hopes for is to get a single one after erasing several "to please the office," as it is styled. The examiner, however, is powerless in the premises except to protest against this "throwing of a tub to a whale," in the way of being willing to sacrifice all but one of a number of equal claims, in order to get one only which is the equivalent of the others

145 and which is a broad, sweeping claim in a reissue, which looks to preventing future manufacturers of an article from availing themselves, just as applicant did do, of well-known and commonly adopted devices. In the patent referred to in figure 2 of drawing, will be seen the rod D^2, guides E^2 E^2, and lifting-arm F^2, pivoted to the operating and guided rod and to the transom window. A mistake of applicant's should here be corrected, as he seems to argue that transom windows are hinged usually so as to be lifted up when opened. The fact is that transom windows are frequently opened horizontally as well as vertically. All such in the examiner's own house open horizontally, like those of Bayley and McCluskey.

It is apparently conceded by applicant, or at any rate must be, with the reference drawing before him, that not the slightest change is required in Bayley and McCluskey's device to adapt it to any transom or set of transoms. Turn the sheet of Bailey and McCluskey's drawing so that the left-hand side becomes the top, and it meets literally applicant's 1st, 2nd and 4th claims. About this applicant makes no question, but argues that because his own transom lifts harder and the old device becomes more useful, that it is therefore patentable. It by no means follows that the well-known vertically-swinging transom moves harder than the horizontal car transom, which is usually turned upon wet, rusty and dust-covered hinges.

Suppose applicant's transom does lift harder, and the old device does here do more work, it is still the old device taken bodily from one window and put on another. As well might a man try to patent an old locomotive (which had previously been only used with light passenger trains), as a new one with a heavy freight train where it did more work and was more useful.

The office believes that not even a suspicion of invention,

146 or even great judgment, was required to take a lifter off of a car window and put it on one inside of a house, and it does not for a moment concede that a shadow of a new function was brought out in this bodily transfer. Any one of applicant's claims appealed would prevent Bailey and McCluskey from using their own device on their own cars, whenever convenience dictated the opening of the transom vertically.

Respectfully submitted,

A. G. WILKINSON, *Examiner.*

To the hon. board of appeal, U. S. Patent Office:

In the matter of the application of J. F. Wollensak for reissue of letters patent No. 136,801, dated March 11th, 1873, on appeal to the examiners-in-chief.

Brief of Applicant.

The claims upon which this appeal is taken are as follows, to wit:

1st. The combination with a transom, its lifting arm and operating rod, of a support for the upper end of the operating rod to prevent it from being bent or displaced by the weight of the transom.

2nd. The combination with a transom, its lifting arm and operating rod, of a support and guide for the upper end of the operating rod.

4th. The guide, G', arranged above the junction of the lifting arm and upright rod, —, combination with the prolonged rod U, the guide G, and arm A, substantially as described, for the purpose specified.

The above-recited 4th claim was contained in the original patent allowed by the examiner, from whom the present appeal is taken.

The 1st and 2nd claims are new in the reissue application. As to the 2nd claim, I am satisfied that it does not differ materially from the first, the difference being the addition of a function performed by the mechanism of the first, and am therefore willing to erase it. I also think that the word "support" should be changed to "guide" in the 1st claim.

147

Just here I desire to correct an error into which the examiner has fallen. In his answer to the reasons of appeal, he asserts, without assigning any reason for the assertion, that all the appealed claims are alike, and upon that basis takes the opportunity of insinuating that "the utmost applicant hopes for is to get a single one after erasing several to please the office, as it is styled." If this is seriously intended to apply to Wollensak's case, a simple denial of its truth, which I here make, is all that is required. If it is intended to influence the action of the examiners-in-chief, it is apparently predicated upon a mistaken idea of their judgment.

The second claim may be erased without injury to the case, so also it may be allowed with the same result, but there is this difference between the 1st and 4th, that one is generic, and the other to special devices. Under such distinction I have yet to find the decision of the office or courts, in which two claims are given equal scope.

The applicant does not stand upon the ground of a mere improver upon devices previously employed for the same purpose, but he is the first man to produce the result by any means whatever; therefore he is clearly entitled to the two claims in question.

The references cited by the examiner I have heretofore considered in my former statement of the case. It is not an improvement in transoms, and could not, without change, be applied to them. Even supposing the devices themselves to be the same, which I deny, their

961

Office Supreme Court U. S.
FILED.
JUL 8 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

On appeal from the Supreme Court of the Territory of Utah.

The People of the Territory of Utah,
Plaintiff and Respondent.
vs.
ENOCH DAVIS,
Defendant and Appellant.

Appellant's Brief.

WARREN N. DUSENBERRY,
Attorney for Defendant and Appellant.

PROVO CITY. - - - UTAH.

DISPATCH JOB PRINT.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

On appeal from the Supreme Court of the Territory of Utah.

TERRITORY OF UTAH, } ss.
COUNTY OF UTAH. }

The People of the Territory of Utah,
Plaintiff and Respondent.
vs.
ENOCH DAVIS,
Defendant and Appellant.

BRIEF.

The Transcript of record on file herein shows:

First. That on the 27th day of December, 1892, the indictment in this cause, against the defendant was duly filed in the District Court of the First Judicial District, of the Territory of Utah, said indictment being in substance as follows:

Venue, Title of Cause, etc. Enoch Davis is accused by the Grand Jury of this Court, by this indictment, of the crime of murder, committed as follows: The said Enoch Davis on the 6th day of June, A. D. 1892, at the County of Uintah, in the said Territory of Utah, in and upon one Louisa Davis, there being, wilfully, feloniously, and of his deliberately premeditated malice aforethought did make an assault, with a certain revolver by him, the said Enoch Davis, then and there had and held with which said revolver, he the said Enoch Davis, her the said Louisa Davis, upon the head, did then and there wilfully, feloniously, and of deliberately premeditated malice aforethought, beat, bruise and wound, thereby then and there inflicting upon the head of her the said Louisa Davis, one mortal wound, of which she the said Louisa Davis, then and there instantly died, and so the Grand Jurors aforesaid, do say that in manner aforesaid he the said Enoch Davis, her the said Louisa Davis, then and there did kill and murder, contrary to the form of the statutes, etc.

Indictment page. 1

Second. That before entering his plea, and on the 29th day of September, 1892, the defendant and appellant herein, duly filed a demurrer to said indictment, on the ground that the said indictment did not charge an offense against the laws of this Territory, which said demurrer was overruled by the Court, and an exception, duly taken by the defendant.

Demurrer page 2

Third. That on the 29th day of September, 1892, the defendant and appellant herein, entered his plea of "Not Guilty," to the charge contained in the said indictment, and a trial by jury was duly had upon the issues joined by his plea aforesaid.

Plea page, 3

Fourth. That on the 26th day of October, 1892, the jury impanneled to try said cause returned into said Court their written verdict, in substance as follows:

"Venue, Title of Cause, etc We the jury impanneled in said cause, find the defendant Enoch Davis, guilty of murder in the first degree.

Verdict of jury page. 4

(Signed by Foreman of the Jury).

Fifth. That on the 3d day of November, 1892, and before sentence, the defendant filed his motion for a new trial on the following grounds:

1st.—That the Court misdirected the jury in matters of law during the trial of said cause, all of which appears of record.

Motion for new trial page 6

2nd.—That the Court erred in his decision upon material questions of law arising during the course of the trial, as appears from the record.

3d.—That the verdict is contrary to the law and the evidence. Which said motion was overruled by the Court and an exception taken by the defendant.

Sixth. That on November the 3d, 1892, and before sentence, the defendant duly filed his motion in arrest of judgment, on the ground: That the said indictment does not charge murder in the first degree, that the jury returned a verdict against the defendant of "murder in the first degree," being in excess of the crime charged in the indictment, which said motion was overruled by the trial court, to which ruling the defendant duly excepted.

Motion in arrest of judgment page. 7

Seventh. That on said date of November the 3d, 1892, the Court then and there sentenced the defendant to be shot until he was dead, on the 30th of December, 1892, to which sentence the defendant then and there excepted.

Death sentence page. 5

Eighth. That thereafter on said November 3d. 1892, the defendant duly filed in said court, and served on the U. S. Attorney, his notice of appeal of said cause, to the Supreme Court of the Territory of Utah, and duly perfected his appeal therein, and assigned errors as follows:

Appeal page. 8

1st. The Court erred in overruling the defendant's demurrer to the indictment.

2nd. The Court erred in overruling the defendant's motion for a new trial.

3d. The Court erred in overruling defendant's motion in arrest of judgment.

4th. The Court erred in failing to pass judgment on defendant before sentence.

5th. The Court erred in imposing and passing on the defendant the death sentence.

Ninth, That on the 27th day of March, A. D. 1893, this cause came up regularly to be heard in the Supreme Court of the Territory of Utah, on said appeal. The United States District Attorney appearing on behalf of the People, and M. M. Warner appearing for the defendant and appellant herein, and said cause being fully argued and on said date submitted, and thereafter on the 29th day of March, A. D. 1893, the said Supreme Court rendered its decision on said appeal, affirming the judgment of the lower court.

Judgment of supreme court page 11

Tenth. That there is manifest error appearing upon the record therein, viz: "the affirming of the judgment of the lower court by the Supreme Court on the points raised in said Appeal, and which are prejudicial to the rights of the defendant and appellant herein.

Error assigned. 12

The assignment of errors and the points upon which defendant relies for reversal, are as follows:

1st. The Court erred in overruling the defendants demurrer to the indictment. (see p. of transcript of record.)

2nd. The Court erred in overruling the defendant's motion for a new trial. (see p of tr.)

3d. The Court erred in overruling defendant's motion in arrest of judgment. (see p. of transcript.)

4th. The Court erred in failing to pass judgment on defendant before sentence. (see p. of transcript.)

5th. The Court erred in imposing and passing the death sentence on the defendant. (see p. of transcript.)

The first assignment of error. "The overruling of defendant's demurrer to the indictment, is not one of the vital points of error complained of by defendant. The defendant however, maintains, that the offense of murder, in this Territory, is a statutory crime, in that, the statutes of the Territory have defined murder to be "murder is the unlawful killing of a human being with malice aforethought." (see section 4452, p. 578, Compiled Laws of Utah, 1888, vol. 2, post,) and that nowhere in the indictment, is the killing charged to have been done unlawfully. (see p. of transcript.)

See Wharton's Crim. Pleading and Practice. Sec. 269, p. 186, and cases there cited.

Sec. 235, p. 160, and cases there cited.

The second error assigned. "That the Court erred in overruling defendant's motion for a new trial. (page of transcript.) Is based upon the material ground, "that the verdict is contrary to the law, and the evidence," in this, that the indictment does not charge murder in the first degree. (See Compiled laws of Utah, 1888.)

The following is a full, complete and correct copy of the Statutes of Utah Territory, defining murder.

(General section 4452.) Murder is the unlawful killing of a human being with malice aforethought.

(G. S. 4453.) Such malice may be expressed or implied. It is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart.

(G. S. 4454.) Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate malice and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being, other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree, and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree

(G. S. 4455.) Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned, at hard labor in the penitentiary for life, at the discretion of the Court, and every person guilty of murder in the second degree shall be imprisoned, at hard labor, in the penitentiary for a term not less than ten years and which imprisonment may extend to life.

The following is a full, complete and correct copy

of the Statutes of the Territory of Utah, in relation to criminal pleading and form of the indictment.

(General Section 4928.) All forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this act.

§ 4929. The first pleading on the part of the people is the indictment.

§ 4930. The indictment must contain:

1st. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties.

2nd. A clear and concise statement of the acts or omissions constituting the offence, with such particulars of the time, place, person and property as will enable the defendant to understand distinctly the character of the offence complained of and answer the indictment, it must be substantially in the following form:

"In the..... Judicial District Court the people of the Territory of Utah against A. B. A. B is accused by the Grand Jury of this court by this indictment of the crime of (giving its legal appellation such as murder, arsod, or the like, or designating it as felony or misdemeanor.)

Committed as follows: The said A. B. on the ——— day of ——— A. D. Eighteen———at the County of ——— (here set forth the act or omission charged as an offence.)

§ 4931. It must be direct and certain as it regards:

1. The party charged.
2. The offence charged.
3. The particular circumstances of the offence

§ 4936. The words used in an indictment are

construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to the legal meaning.

§ 4937. Words used in a statute to define a public offence need not be strictly pursued in the indictment; but other words conveying the same meaning may be used.

§ 4938. The indictment is sufficient if it can be understood therefrom.

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated.

2. That it was found by a Grand Jury of the district in which the court was held.

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury unknown.

4. That the offence committed was within the jurisdiction of the Court and is triable therein.

5. That the offence was committed at some time prior to the time of finding of the indictment.

6. That the act or omission charged as the offence is clearly and distinctly set forth, without repetition, and in such a manner as to enable the Court to understand what is intended, and to pronounce judgment upon conviction according to the rights of the case."

In that, it does not allege the murder to have been perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing.

Nor does it charge the killing to have been done

in the perpetration of, or in the attempt to perpetrate any arson, rape, burglary or robbery.

Nor does it charge the murder to have been perpetrated from any premeditated design, unlawfully and maliciously to effect the death of any other being, than her who was killed.

Nor does it charge that the murder was perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life. Nor can it be reasonably inferred from the language of the indictment that there was a premeditated design to kill. While the verdict rendered by the trial jury was a verdict of" murder in the first degree," (see page of transcript,) being a verdict in excess of the crime charged in the indictment, and therefore void.

As to sufficiency of indictment, see Bishop's New Criminal Law, Vol. 1, *Sec.* 797.

State vs. Brown, 21 *Kan.* 38.

Foutz vs. State, 8 *Ohio* (*State*) 109.

Kain vs. State, 8 *Ohio* (*State*) 306.

Keenan vs. Com., 44 *Pa.* (*St.*) 55.

Snyder vs. State, 59 *Ind.* 105.

Hagan vs. State, 30 *Wis.* 428.

Bishop's Crim. Prac., Vol. 2, *Sec.* 161 *to* 595 *inclusive.*

State vs. Jones, 20 *Mo.* 58.

State vs. McCor., 27 *Iowa* 402.

State vs. Boyle, 28 *Iowa* 522.

State vs. Knouse, 29 *Iowa* 118.

State vs. Thompson, 31 *Iowa* 393.

People vs Holliday, 5 *Utah* 467.

Field vs. State, 52 *Ala.* 348.
Weller vs. People, 30 *Mich.* 276.
Johnson vs. Com., 24 *Pa.* (*St.*) 387.

The third assignment of error, "that the Court erred in overruling defendant's motion in arrest of judgment" (see page of transcript) is one of the vital errors, complained of in this case.

The defendant maintains that his motion should have prevailed, for the reason, that the verdict of the jury was repugnant to the offence charged in the indictment, and that said verdict was absolutely void, on that account. And that it left the defendant in the condition as if no verdict had ever been rendered at all.

See Fouts vs. State, 8 Ohio (St.) 98.
State vs. Scannel, 39 Maine 8.
State vs. Brown, 21 Kansas 38.
McCormac vs. State, 27 Ia. 408.
State vs. White, 41 Ia. 316.
White vs. People, 33 Mich. 300.
Gibbs vs. State, 34 Texas 134.
Rhodes vs. Com., Pa. 6 Atl. Rep. 246.
Riflemaker vs. State, 25 Ohio St. 395.
O'Connell vs. State, 55 Ga. 191.
State vs. Brown, 1 Haywood, N. C. 100.
State vs. Rollins, 8 N. H. 550.
Com. vs. Adams, 127 Mass. 15.

The fourth assignment of error, "that the Court erred in failing to pass judgment on the defendant, adjudging him guilty of some offence, (see page of transcript,) is also one of the vital points, upon which the

defendant relies as error, in that, there being no legal judgment against the defendant, the Court could not legally sentence the defendant for any offence.

See General Section 5100 of the Compiled laws of Utah, 1888, Vol. II. which is as follows:

§ 5100. After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, if the judgment is not arrested, or a new trial granted, the Court must appoint a time for pronouncing judgment, which must be at least two days after the verdict, if the court intend to remain in session so long; or if not, as remote a time as can reasonably be allowed, but in no case can the judgment be rendered in less than six hours after the verdict."

The fifth assignment of error, "that the Court erred in imposing and passing the sentence of death upon the defendant," is the last, and also one of the vital points of error, in said cause relied on by the defendant. The defendant insists that there being no legal verdict rendered against him by the jury, and also that there being no legal, nor any judgment against him, rendered by the Court, that the Court had no legal right to sentence the defendant to suffer the death penalty, or to pass any sentence upon the defendant.

See State vs. White, 41 Ia. 316.
Wright vs. People, 33 Mich. 300.
Gibbs vs. State, 34 Tex. 134,
Rhodes vs. Com., (Pa.) 6 Atl. Rep. 245.
Riflemaker vs. State, 25 Ohio (St.) 395.
O'Connell vs. State, 55 Ga. 191.

Com. vs. Call, 21 Pick. (Mass.) 509.
Reg. vs. York, 1 Den. C. C. 335.
State vs. Brown, 1 Haywood, (N. C.) 100.
Dyer vs. Com., 40 Mass. 402.
State vs. Rollins, 8 N. H. 550.
Com. vs. Adams, 127 Mass. 15.

In view of the errors herein, we submit that the judgment should be reversed, and the cause remanded.

Warren R Dusenbury

Attorney for Defendant and Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ENOCH DAVIS, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF Utah. } No. 961.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

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ENOCH DAVIS, PLAINTIFF IN ERROR,
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THE PEOPLE OF THE TERRITORY OF UTAH. } No. 961.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error was indicted in September, 1892, in the first judicial district court of the Territory of Utah, for the crime of murdering one Louisa Davis. A demurrer to the indictment was overruled, the defendant put on trial, and a verdict returned finding him "guilty of murder in the first degree as charged in the indictment." Motions for new trial and in arrest of judgment

were overruled, and on November 3, 1892, he was sentenced to death. On appeal, the supreme court of the Territory affirmed the judgment of the district court. The opinion is in the record, pages 6 to 10.

This is a writ of error sued out under section 3 of the act of June 23, 1874, c. 469, 18 Stat., 253.

ARGUMENT.

The errors assigned, although five in number (Rec., 12), resolve themselves into two, viz:

(1) That the indictment is not sufficient to support a verdict of murder in the first degree, and

(2) That no judgment was rendered before sentence.

With respect to this second error assigned, it is sufficient to say that the recital in the record that the prisoner was sentenced to death sufficiently shows an adjudication by the court that he was convicted of a capital crime. The judgment of conviction is included in the sentence. (*Green* v. *Commonwealth*, 12 Allen, 155, 164, 165.)

AS TO THE SUFFICIENCY OF THE INDICTMENT.

The first specific error assigned, viz, that "the court erred in overruling the defendant's demurrer to the indictment," seems to be abandoned, counsel for the plaintiff in error, on page 5 of his brief, stating that it is "not one of the vital points of error." The demurrer, which was general, seems to have been intended to raise the objection that the killing is not charged in the indictment to have been done "unlawfully." But as the indictment is not required to be in the words of the statute (C. L. Utah, 1888, sec. 4937), and as

the facts averred show that the killing was by an assault and battery, and therefore unlawful, authority is not required to sustain the position that it was not essential to use the epithet "unlawful." The indictment must therefore be held sufficient to charge the prisoner with the crime of murder, as it was known at common law, and we are brought to the question, raised by the prisoner's counsel, whether its averments are sufficient, under the statutes of Utah, to support a verdict of murder in the first degree.

By the statutes of Utah (Compiled Laws, 1888, general section 4452), murder is defined, as at common law, to be "the unlawful killing of a human being with malice aforethought." By section 4453 it is declared that "such malice may be express or implied," distinguishing the two kinds; and by section 4454 that "every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate malice and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; and any other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree."

The prisoner's objection is that the indictment, while it charges "the unlawful killing of a human being with malice aforethought," and therefore the crime of murder

as it was known at common law and as it is defined in section 4452, and while it shows a deliberate assault, does not charge that there was "a premeditated design to kill" (Brief p. 9), and consequently is wanting in an averment essential to murder in the first degree as defined by section 4454.

I answer to this objection

(1) That the indictment, read in the light of the statutes of Utah, which do away with common law forms and prescribe simple methods of pleading in criminal actions, does show that the killing was premeditated, and

(2) That an indictment which charges murder generally, as it was known at common law and as it is defined in section 4452, is sufficient, in Utah, to support a verdict of murder in either degree.

I.

THE AVERMENTS ARE SUFFICIENT UNDER THE CRIMINAL CODE OF UTAH TO SHOW THAT THE KILLING WAS PREMEDITATED.

The statutes of Utah relating to pleadings in criminal actions are set out in the prisoner's brief, pages 7 and 8. Section 4928 declares that "all the forms of pleading in criminal actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act." Section 4930 prescribes the substantial form of indictments, and declares that they must contain "a clear and concise statement of the acts or omissions constituting the offense, with such particulars of the time, place, person, and property as will enable the defendant to under-

stand distinctly the character of the offense complained of and answer the indictment." Section 4936 provides that "the words used in the indictment are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning." Section 4937 declares that "words used in a statute to define a public offense need not be strictly pursued in the indictment, but other words, conveying the same meaning, may be used." Section 4938 provides that "the indictment is sufficient if it can be understood therefrom" (omitting features that are not involved at bar) "that the act or omission charged as the offense is clearly and distinctly set forth without repetition, and in such a manner as to enable the court to understand what is intended and to pronounce judgment upon a conviction according to the rights of the case."

Tested by these rules, I submit that the averments of the indictment are sufficient to show that the killing was premeditated. The indictment "accuses" the defendant "of the crime of *murder, committed as follows*," and then avers that the defendant "wilfully, feloniously, and of his deliberately premeditated malice aforethought, did make an assault with a certain revolver by him, the said Enoch Davis, then and there had and held, with which said revolver he, the said Enoch Davis, her, the said Louisa Davis, upon the head did then and there willfully, feloniously, and of his deliberately premeditated malice aforethought, beat, bruise and wound, thereby then and there inflicting upon the head of her, the said Louisa Davis, one mortal wound, of which the said Louisa Davis then and

there instantly died; and so the grand jurors aforesaid so [do] say *that in the manner aforesaid, he*, the said Enoch Davis, her, the said Louisa Davis, *then and there did kill and murder*, contrary to the form of the statutes," etc.

The assault by which the homicide was committed, and the mortal wound, are alleged to have been made and inflicted feloniously and with premeditated malice aforethought. It is not alleged in terms that the defendant made the assault with intent to kill, but the purpose of the assault, and the intent thereby to kill, is fairly deducible from the other allegations. The instrument used, the fierceness of the assault, the manner and place of inflicting the wounds, the instantly fatal result, taken in connection with the rule that one must be held to intend the natural consequences of his act, sufficiently show the intention of the prisoner in delivering his blows. A person who uses a deadly weapon in an unlawful manner must be taken to intend the natural and usual consequences resulting from such use.

I may fairly apply to this indictment the statement employed in *State* v. *Smith* (38 Kans., 199, that "the language of the indictment taken together plainly imports that the defendant beat, bruised, and wounded the deceased with the intention of murdering her; and it is clear that neither the defendant nor his counsel could have mistaken the nature and degree of the offense charged."

In *People* v. *Davis* (73 Cal., 355), it was held that an indictment alleging that, at a specified time and place, the defendant did "willfully, feloniously, premeditatedly, and of his malice aforethought make an assault upon one

William Krumdick, a human being, and did then and there inflict upon the body of the said W. K. a mortal wound, of which said mortal wound so inflicted by said James Davis the said W. K. did afterwards die," sufficiently charged the infliction of a mortal blow, willfully, feloniously, premeditatedly, and of malice aforethought, and was a sufficient charge not only that the assault, but that the killing, was willful and of malice aforethought.

The indictment at bar shows also that the murder was "perpetrated by an act greatly dangerous to the lives of others, evidencing a depraved mind, regardless of human life," which is sufficient, under the statute (section 4454), to constitute murder in the first degree.

It is further to be observed that the words used to characterize the assault and blows which resulted in death are referred to in the subsequent and concluding charge, and it being stated that "in manner aforesaid" the defendant did murder the deceased, there was no occasion to repeat the allegations as to malice and premeditation. In *State* v. *Brown* (21 Kans., 38, 48, 49), cited by the plaintiff in error, the indictment, after averring a malicious and premeditated assault, did not conclude with the simple and general allegation, found in the indictment at bar, that the defendant "in the manner aforesaid" did murder the deceased. It undertook, on the contrary, to characterize the murder as well as the assault, and in doing so failed to aver that the killing was premeditated. The conclusion of the indictment in that case was that the defendant, "in the manner and by the means aforesaid, unlawfully, feloniously, willfully, wickedly, purposely, maliciously, and

with malice aforethought did kill and murder." Having undertaken to specify the particulars of the killing, the prosecutor was rightly held bound to mention all upon which he relied.

II.

IN UTAH AN INDICTMENT WHICH AVERS MURDER GENERALLY, AS KNOWN AT THE COMMON LAW AND AS DEFINED BY SECTION 4452 (C. L., UTAH, 1888), IS SUFFICIENT TO SUPPORT A VERDICT OF MURDER IN THE FIRST DEGREE.

The statutes of Utah distinguishing murder into two degrees are not meant to prescribe a rule of pleading by which murder in the first and second degrees must be charged in an indictment as distinct crimes; but only to guide the court and jury in awarding punishment. Such is the construction that has been placed upon similar statutes by the courts of last resort in most of the States where such statutes are found.

Mr. Wharton thus states the result of the cases and supports them on principle (2 Wharton on Criminal Law, 7th Ed., section 1115):

> According to the great weight of authority a common-law indictment for murder is sufficient to support, under the statutes, murder either in the first or second degree.

The authorities are gathered in 2 Wharton on Criminal Law, 7th and Rev. Ed., sec. 1115, note *a*, and in 2 Bishop on Criminal Procedure, 3d Ed., sec. 584, note 5. Mr. Bishop criticises the cases, but admits the weight of authority.

The following are among the most important of the cases referred to: *White* v. *The Commonwealth*, 6 Binney, 179, 182, 183; *Commonwealth* v. *Flanagan*, 7 W. & S., 415, 418 (Pennsylvania was the first State to pass a law distinguishing murder into two degrees); *Commonwealth* v. *Gardner*, 11 Gray, 444; *Commonwealth* v. *Desmarteau*, 16 Gray, 1; *Commonwealth* v. *Green*, 12 Allen, 155, 170; *State* v. *Pike*, 49 N. H., 399 (where the authorities are reviewed generally); *Fitzgerald* v. *People*, 37 N. Y., 413; *Conroy* v. *People*, 97 N. Y., 62; *Willett* v. *People*, 102 N. Y., 254; *State* v. *Verrill*, 54 Me., 408, 415; *The People* v. *Murray*, 10 Cal., 309; *Davis* v. *State*, 39 Md., 355; *Wicks* v. *Commonwealth*, 2 Va. Cas., 387; *Livingston* v. *Commonwealth*, 14 Grat., 592; *Gehrke* v. *State*, 13 Tex., 568; *Mitchell* v. *State*, 5 Yerg., 340; S. C., 8 Yerg., 514; *McAdams* v. *State*, 25 Ark., 405, 415, 416; *Leschi* v. *Territory*, 1 Wash. Ter., 13, 21; *State* v. *Lessing*, 16 Minn., 75; *State* v. *Millain*, 3 Nev., 409 (see p. 439 for criticism of Mr. Bishop's views); *Hogan* v. *State*, 30 Wis., 428, 439; *Territory* v. *Stears*, 2 Mont., 326—approved in 5 Mont., 243; *Graves* v. *State*, 45 N. J. L., 203.

The following provisions of the statutes of Utah seem to make it clear that, under the criminal code of that Territory, it is neither necessary nor proper to charge murder in the first degree as a distinct offense.

> SEC. 5044. Upon a trial for *murder*, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to

show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

SEC. 5060. In charging the jury the court must state to them all matters of law necessary for their information. * * *

SEC. 5075. A verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment.

SEC. 5076. *Whenever a crime is distinguished into degrees*, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

SEC. 5101. Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree.

And, in Section 4930, which prescribes the form of indictments, the direction is to "accuse" the defendant of the crime of "murder," not of the crime of murder in either the first or second degree.

In *The People* vs. *Murray* (10 Cal., 309, 310), Baldwin, J., said:

> It is evident that, as it is left to the jury to decide whether the defendant is guilty of murder in the first or second degree, no distinction between the first and second degrees of the crime was considered necessary to be made by the indictment; for, if the indictment charged the murder in the second degree, it would not be necessary, of course, for the jury to designate the degree.

In *White* vs. *Commonwealth* (6 Binney, 179, 183), Tilgman, C. J., said:

> It seems taken for granted that it would not always appear on the face of the indictment of what degree

> the murder was, because *the jury are to ascertain the degree*, by their verdict, or in case of confession, *the court are to ascertain it* by examination of witnesses. But if the indictments were so drawn as plainly to show that the murder was of the first or second degree, all that the jury need do would be to find the prisoner *guilty* in manner and form as he stands indicted. [Italics in the original.]

In *Graves* v. *State* (45 N. J. Law, 203, 206), Beasley, C. J., says:

> This duty assigned to the jury necessitates the crime to be laid in a form that embraces it in both its degrees. The effect of the statute in question, according to the entirely-settled construction, was neither to add any case to, nor take any case from, the class of crimes which, at common law, was denominated murder, for every act that was murder at common law is still murder in this State. What this statute effected was to distribute the offense into two classes for the sake of adjusting the punishment. Those facts that constituted murder in the second degree were all necessary parts and constituents of murder in the first degree, and the conviction of the lesser crime under the charge of the higher crime which embraced it was, upon well-known principles, entirely normal. The practice is consistent with scientific rules, and, at all events, has been too long established by usage and judicial recognitions to be now open to impeachment.

In subsequent passages of his opinion, the learned chief justice refers to "the old and verbose form of pleading in common use," and speaks of the substitution of "a simple pleading" for "those cumbrous and useless ones" as "a fortunate amelioration of the law."

The ground upon which the decisions in Massachusetts proceed is thus stated by Bigelow, C. J., in *Green* vs. *The Commonwealth* (12 Allen, 155, 170).

> The reason on which these decisions were founded was this: That the statute establishing degrees of murder did not create any new offense or change the definition of murder as it was understood at common-law; that the forms of indictment previously in use descriptive of murder embodied every shade or degree of the crime, from that which was most aggravated, malicious, and premeditated, down to that which had only the element of implied malice in its most mitigated form; and that as the offense was not changed, but only its punishment mitigated in certain cases, the indictment was sufficient to embrace every species of murder, whether it fell within one or the other of the degrees of homicide as defined by the statute. The logical and necessary conclusion from these decisions is that an indictment for murder in the common form does charge murder in the first degree.

The force of the decisions of the supreme judicial court of Massachusetts is not affected by the circumstance that the statute of that State declares that the provisions relating to the different degrees of murder shall in no manner require any modification of the existing forms of indictment, because, as stated by Danforth, J., in *The State* vs. *Verrill* (54 Me., 416), "under their constitution, as well as under ours, a person can only be held to answer to a charge 'duly and technically set forth in apt and appropriate words.'"

I do not mean to say that, wherever murder is distinguished into degrees, a common-law indictment is sufficient to charge murder in the first degree. In Ohio, for instance, there are no crimes by the common law, and the statute nowhere defines the crime of murder generally, as does section 4452, C. L. Utah. The Ohio statute creates murder in the first degree as one offense, and murder in the second degree as a separate and distinct offense, and, as said by Swan, J., dissenting in *Fouts* vs. *State* (8 Ohio St., 98, 125), no one ever claimed that a common-law indictment for murder is good in that State, or disputed the necessity of averring a purpose to kill. The real point of dissent in *Fouts* vs. *State* and in *Kain* vs. *State* (8 Ohio St., 306, 321) was as to the construction to be given to the language of the indictments before the court, all the judges agreeing that an averment of facts showing a purpose to kill was necessary. It is a gross misapprehension of those cases, therefore, to classify them, as does Mr. Bishop, among those favoring his view of the point discussed by him. Whether a common-law indictment is sufficient to charge murder in the first degree, in States in which the crime is distinguished into degrees, may depend upon the proper construction of several statutory provisions taken together. But in Utah, where murder is defined generally by section 4452 as it was known at common law, where the form of indictments prescribed by statute (section 4930) requires the prosecutor to "accuse" the prisoner of "murder," and where the judge under section 5101 upon a plea of guilty, or the jury under section 5075 upon a plea of not guilty, are required

to determine the degree, an indictment which charges the general crime, as defined by the statute, is sufficient to include both of its degrees, and no other form of indictment is either necessary or proper.

AS TO THE JUDGMENT THAT SHOULD BE RENDERED IF THE INDICTMENT IS HELD INSUFFICIENT TO SUSTAIN THE VERDICT.

In *State* v. *McCormick* (27 Iowa, 402) on a conviction for murder in the first degree the reviewing court held the indictment bad as an indictment for that offense, but modified the judgment by sentencing the prisoner as upon a conviction for murder in the second degree. In *Johnson* v. *Commonwealth* (24 Pa., 386) under a general verdict of guilty the trial court sentenced as for a conviction of murder in the first degree. The case was remanded to the lower court to pass sentence as for a conviction of murder in the second degree.

In *Hogan* v. *State* (30 Wis., 428) on a general verdict of guilty sentence of death was pronounced. The Supreme Court reversed the judgment and remanded the case for a new trial. This practice seems to have been adopted, except in two instances, in the cases cited on page 10 of the prisoner's brief. But in Utah, the statutes governing appeals in criminal cases provide that the supreme court of the territory "may reverse, affirm, or *modify* the judgment or order appealed from, and may set aside, affirm or modify any or all proceedings, subsequent to or dependent upon such judgment or order, and may, if proper, order a new trial" (C. L., sec. 5154). Under this statute it would

seem to be competent for the court, if the indictment shall be held insufficient to support a verdict of murder in the first degree, to reverse and remand, without ordering a new trial, so that the trial court may sentence as upon a conviction of murder in the second degree.

I respectfully submit that there is no error apparent on the record, and that the judgment should be affirmed.

LAWRENCE MAXWELL, JR.,
Solicitor-General.